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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal law enforcement officers, and agents of the Drug Enforcement Administration in particular, have authority to enforce a federal criminal statute that applies to acts perpetrated against a United States official in a foreign country by arresting an indicted criminal suspect on probable cause in a foreign country.

2. Whether an individual arrested in a foreign country may bring an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, for false arrest, notwithstanding the FTCA's exclusion of "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k), because the arrest was planned in the United States.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America. Petitioner's co-defendants in district court and appellees in the court of appeals were Hector Berellez, Bill Waters, Pete Gruden, Jack Lawn, and Antonio Garate-Bustamante, all individual employees and agents of the U.S. Drug Enforcement Administration for whom the United States was ultimately substituted as defendant; José Francisco Sosa, a Mexican national resident in the United States under the federal witness protection program; and five unnamed Mexican nationals in the federal witness protection program. Respondent is Humberto Alvarez-Machain.

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-121a) is reported at 331 F.3d 604. The panel opinion of the court of appeals (Pet. App. 122a-156a) is reported at 266 F.3d 1045. The district court's orders of March 18, 1999 (Pet. App. 157a-207a) and May 18, 1999 (Pet. App. 208a-211a), and its September 9, 1999, judgment (Pet. App. 212a-247a), as amended on September 23, 1999 (Pet. App. 248a-249a) are unreported.

JURISDICTION

The judgment of the court of appeals sitting en banc was entered on June 3, 2003. On August 27, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including October 1, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of Section 878 of Title 21 of the United States Code, and the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, are set out in the Appendix to the Petition, Pet. App. 250a-255a.

STATEMENT

1. In February of 1985, Drug Enforcement Administration (DEA) Special Agent Enrique Camarena-Salazar was abducted by members of a Mexican drug cartel and brought to a house in Guadalajara, Mexico, where he was tortured for two days to extract information regarding what the DEA knew about the cartel. Camarena-Salazar was then murdered and buried in a park near Guadalajara. See *United States* v. *Zuno-Arce*, 44 F.3d 1420, 1422 (9th Cir.), cert. denied, 516 U.S. 945 (1995). Eyewitnesses placed respondent Humberto Alvarez-Machain, a Mexican citizen, at the house while Camarena-Salazar was being tortured. See *United States* v. *Zuno-Arce*, 25 F. Supp. 2d 1087, 1092-1093 (C.D. Cal. 1998); see Pet. App. 213a. DEA officials believe that respondent, "a medical doctor, participated in the murder by prolonging Agent Camarena's life so that others could further torture and interrogate him." *United States* v. *Alvarez-Machain*, 504 U.S. 655, 657 (1992).

In 1990, a federal grand jury indicted respondent for the torture and murder of Camarena-Salazar in violation of, among other statutes, 18 U.S.C. 1201(a), 1203, and the United States District Court for the Central District of California issued a warrant for his arrest. The DEA attempted to obtain respondent's presence in the United States through informal negotiations with Mexican officials. *Alvarez-Machain*, 504 U.S. at 657 n.2. After those negotiations proved unsuccessful, the

DEA approved the use of Mexican nationals to take custody of respondent in Mexico and to transport him to the United States. Several Mexican nationals, acting at the behest of the DEA, then seized respondent from his office in Mexico, and in less than 24 hours moved him to the United States and into the custody of United States law enforcement officials. Pet. App. 5a.

Respondent moved for dismissal of the indictment against him, arguing that he could not be tried in the United States because his seizure from Mexico was contrary to international law and an extradition treaty between the United States and Mexico. The district court and the Ninth Circuit agreed, ordering that the charges be dismissed and that respondent be returned to Mexico. See *United States* v. *Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991) (per curiam), aff'g *United States* v. *Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990). This Court reversed. Respondent's arrest, the Court held, "was not in violation of the Extradition Treaty." *Alvarez-Machain*, 504 U.S. at 670. Even if the arrest violated international law, the Court further held, respondent could be tried in this country. *Ibid.* The case was remanded for trial. However, at the close of the government's case, the district court granted respondent's motion for a judgment of acquittal. Pet. App. 6a-7a.

2. In 1993, after returning to Mexico, respondent brought this civil action asserting various claims—including false arrest and imprisonment—against the United States, several DEA officials, and seven Mexican nationals. Although respondent also brought tort claims asserting abuse and torture, the district court rejected those claims after trial, finding them "unworthy of belief," "incredible," and "completely contrived," and that respondent had repeatedly "lied dur-

ing his deposition." Pet. App. 277a-228a, 230a, 231a; see *id.* at 224a (earlier findings, in the criminal case, that such claims were "not worthy of belief" and "simply * * * not credible"). Respondent did not appeal those findings, and those claims are therefore no longer at issue in this case. *Id.* at 7a-8a & nn.2-3.

Respondent sought recovery from the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, which provides that the "United States shall be liable * * * to tort claims, in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674, subject to certain exceptions and limitations. Respondent's suit against the individual defendants proceeded under the Alien Tort Statute (ATS), 28 U.S.C. 1350. The district court substituted the United States for the individual federal defendants pursuant to 28 U.S.C. 2679. The United States, however, was not substituted for Sosa, a Mexican national, for respondent's ATS claims against him. Pet. App. 159a & n.2.

a. Following an interlocutory appeal, see *Alvarez-Machain* v. *United States*, 107 F.3d 696 (9th Cir.), cert. denied, 522 U.S. 814 (1997), the district court granted the United States' motion for summary judgment in its entirety. Although the government argued that the action for false arrest and false imprisonment under the FTCA was barred by the exception for "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k), the district court rejected that argument. Pet. App. 177a-181a. The court agreed that the arrest took place in Mexico. *Id.* at 177a. But the court held that Alvarez-Machain had stated a "valid 'headquarters claim' for his seizure because it stemmed from a plan which developed entirely within the United States." *Id.* at 181a n.18; see *id.* at 178a-181a.

The district court nonetheless concluded that respondent had failed to establish a false arrest claim under California law.[1] California defines false arrest as "an arrest conducted without lawful authority." Pet. App. 184a. Looking to state court decisions and statutes, *id.* at 184a-185a, the district court determined that California law authorizes peace officers and private citizens to make an arrest whenever they have "reasonable cause" to believe the arrestee committed a felony. *Id.* at 184a (citing Cal. Penal Code §§ 834, 837 (West 1999)). The court concluded that those provisions would "clearly" authorize government agents and private citizens alike to arrest respondent, an indicted criminal suspect. *Id.* at 185a; see *id.* at 189a-190a.

Because the arrest took place in Mexico, the district court also addressed how California law would treat extraterritorial arrests. Pet. App. 185a-190a. The court noted that California law allows a foreign peace officer in fresh pursuit to exercise arrest authority in California. *Id.* at 186a-187a. Similarly, the court explained, California law does not limit citizen arrest authority to California citizens—*i.e.*, "if a peace officer, or any individual, from another state entered California with the requisite probable cause to arrest an individual, then California would presumably not consider that action a false arrest." *Id.* at 187a. Because

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[1] Under the FTCA, the government's liability is determined according to local law. See 28 U.S.C. 1346(b) (giving courts jurisdiction over certain tort claims "if a private person" would "be liable to the claimant in accordance with the law of the place where the act or omission occurred"). The government argued that, because the arrest occurred in Mexico, Mexican law should govern—and that, for that reason, the foreign country exception of the FTCA applied. However, the parties agreed that if, contrary to the position of the United States, Mexican law did not apply, California law would. Accordingly, the district court applied California law.

the government had probable cause to arrest, the district court concluded that the arrest was not false within the meaning of California law. *Id.* at 189a-190a.

The district court, however, granted summary judgment against one of the Mexican nationals, José Francisco Sosa, holding him liable under the ATS. In particular, the court concluded that respondent's transborder arrest and detention violated international law. Pet. App. 194a-199a, 209a-210a. Nonetheless, the court held that respondent was entitled to damages only from the time he was seized in Mexico until he was handed over to law enforcement officials in the United States. Once respondent was handed over to United States officials, the court held, the United States law enforcement authorities made an independent and lawful decision to keep respondent in custody for which Sosa could not be held liable. *Id.* at 233a-241a. After trial (and after rejecting respondent's claims of mistreatment, see pp. 3-4, *supra*), the court entered judgment for respondent and against Sosa in the amount of $25,000. Pet. App. 244a, 247a.

3. Respondent and Sosa appealed, and a panel of the Ninth Circuit affirmed in part and reversed in part. Pet. App. 122a-156a.

With respect to the FTCA false arrest claim against the United States, the panel reversed the judgment in favor of the United States. The panel stated that to "determine whether a federal officer had lawful authority to carry out an arrest, a California court would first ask whether the arrest was authorized under federal law." Pet. App. 142a. The panel agreed that the criminal statutes under which respondent was indicted expressly apply to acts occurring abroad. See *id.* at 143a. It agreed that there was probable cause for respondent's arrest for those crimes. *Ibid.* And it agreed that

the arrest authority provided to DEA agents under 21 U.S.C. 878—authority to "make arrests without warrant * * * for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony"—is very broad. Pet. App. 142a.

The panel, however, refused to hold that DEA agents have statutory authority to enforce extraterritorial laws abroad, remarking that "[i]f this assertion is an accurate statement of United States law, then it reinforces the critics of American imperialism in the international community." Pet. App. 144a. The panel instead "suppose[d] that Congress intended for federal law enforcement officers to obtain lawful authority, which for example, here might be a Mexican warrant, from the state in which they sought to arrest someone." *Ibid.* Because the DEA did not obtain an arrest warrant from a Mexican court, the panel concluded that respondent's arrest was effected "without lawful authority" and was actionable against the United States as a "false arrest" under the FTCA. *Id.* at 144a-145a.

The panel also rejected the district court's conclusion that the arrest was not "false" under California law. Pet. App. 145a-147a. The court did not dispute that, under California law, an arrest effected outside the scope of an officer's statutory authority may be deemed a lawful citizen arrest. *Id.* at 145a. But the court held that the proper standard for federal officers is the law governing arrests pursuant to a warrant. In this case, the court stated, the warrant issued for respondent's arrest "had no effect in Mexico," and its "invalidity * * * for the purposes of [respondent]'s arrest meant that the DEA agents did not act properly under the general common law." *Id.* at 146a; see *id.* at 147a (arrest improper because court issuing the warrant "had

no jurisdiction to issue a warrant for an arrest in Mexico").

The panel also rejected the government's argument that the claim was precluded by the FTCA's exception for "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k). See Pet. App. 135a-139a. Because the seizure had been planned in the United States, the court stated, the claim was actionable under the so-called "headquarters" exception. See *id.* at 137a-139a.

Finally, the panel affirmed the judgment in favor of respondent against Sosa under the ATS. Pet. App. 126a-133a. The panel first held that the seizure violated "the law of nations" because it infringed respondent's right to "freedom of movement, to remain in his country, and to security in his person." *Id.* at 131a. In the alternative, the court held that the arrest violated the international law prohibition on "arbitrary detentions." *Id.* at 131a-133a. A detention is "arbitrary," the court of appeals held, if it is not "pursuant to law." *Id.* at 131a. Because respondent's seizure in this case occurred pursuant to neither the laws of Mexico nor the laws of the United States, the court held, it was an "arbitrary" arrest. *Id.* at 131a, 132a-133a.

4. The court of appeals then reheard the case en banc, reaching largely the same result by a six-to-five vote. Pet. App. 1a-122a.

a. The en banc majority agreed with the original panel's conclusion that the DEA lacks authority to effect arrests or otherwise enforce United States law outside the United States, even where the statute being enforced applies extraterritorially. The majority accepted that this Court's decision in *United States* v. *Bowman*, 260 U.S. 94 (1922), renders the general presumption against extraterritorial application of United States laws inapplicable to "criminal statutes which are,

as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated." Pet. App. 36a (quoting *Bowman*, 260 U.S. at 98). The majority thus had "no doubt that the substantive criminal statutes under which [respondent] was charged apply to acts occurring outside the United States." *Ibid.*

The majority, however, rejected the government's argument that law enforcement agents have authority to enforce federal statutes outside the United States. Pet. App. 38a. "Congress may have intended the reach of a criminal statute to extend beyond our borders," the court stated, but that does "not mean that Congress also intended to give federal law enforcement officers unlimited authority to violate the territorial sovereignty of any foreign nation to enforce those laws, or to breach international law in doing so." *Ibid.* The court accordingly rejected the government's contention that 21 U.S.C. 878(a)(3), which places no express territorial limits on the DEA's arrest authority, gives DEA agents enforcement authority co-extensive with the geographic scope of the laws they are charged with enforcing. Pet. App. 40a-41a. Instead, the court invoked the presumption against extraterritoriality and distinguished *Bowman*: Because the arrest authority provided by Section 878 is a regulation of "executive authority, not criminal conduct," the court stated, the provision cannot "be classified as a 'criminal statute[] which [is] . . . not logically dependent on [its] locality for the Government's jurisdiction." *Id.* at 41a-42a. The court stated that it was unwilling to assume that Congress had "turned a blind eye to the interests of equal sovereigns and the potential violations of international law that would inevitably ensue." *Id.* at 46a-47a.

Agreeing with the reasoning of the original panel opinion, the majority also rejected the claim that the seizure could be deemed a valid citizen arrest under California law. *Id.* at 70a-72a.

The majority stressed that it was not questioning "the powers of the political branches to override the principles of sovereignty in some circumstances, should the need arise." Pet. App. 47a. But the court declared that it would not "impute such an intent where it is not expressed," *ibid.*, and thus would not permit extraterritorial enforcement even of those laws that by their terms apply extraterritorially "absent a clear directive" from Congress, *id.* at 50a.

While holding respondent's arrest to be "false" precisely because it occurred in Mexico, the court of appeals concluded that the arrest was actionable notwithstanding the FTCA's exclusion of claims "arising in a foreign country." Pet. App. 65a-68a. The claim, the en banc majority held, fell within the "headquarters doctrine" (as articulated by the California courts, *id.* at 66a) because respondent's seizure was planned and coordinated in the United States. *Id.* at 67a-68a.

Finally, the en banc court affirmed the judgment against Sosa. Disagreeing with the panel opinion, the majority held that there is no specific, universal, and obligatory rule of international law according individuals a personal right to be free of transborder arrests. Pet. App. 21a-28a. But the en banc majority held that there is an obligatory rule of international law prohibiting "arbitrary arrests." *Id.* at 28a-30a. Respondent's arrest was "arbitrary," the court further held, because it was authorized neither by United States nor Mexican law. *Id.* at 33a. Sosa has filed a separate petition

challenging the ATS judgment against him, No. 03-339 (filed Sept. 2, 2003).[2]

b. Judge Fisher filed a concurring opinion, joined by Judges Schroeder, Goodwin, Thomas, and Paez. Pet. App. 73a-80a. Judge Fisher, while fully joining the majority opinion, concluded that the DEA agents lacked authority to conduct this arrest because "neither Congress nor the Executive has expressed an intent to allow sub-Cabinet-level law enforcement officials in the DEA to be the final arbiters of that authority." *Id.* at 73a. Judge Fisher stated that, while "Congress may have intended a criminal statute to reach conduct that occurs beyond our borders, * * * that does not mean that Congress also intended to give law enforcement officers unlimited authority to enforce the statute by entering a foreign nation, uninvited, to abduct a foreign national, in violation of international law." *Id.* at 79a.

c. Judge O'Scannlain dissented in an opinion joined by Judges Rymer, Tallman, and Kleinfeld. Pet. App. 80a-108a. Judge Gould dissented separately. *Id.* at 108a-121a. Judge O'Scannlain's dissent began:

> We are now in the midst of a global war on terrorism, a mission that our political branches have deemed necessary to conduct throughout the world, sometimes with tepid or even non-existent cooperation from foreign nations. With this context in mind, our court today commands that a foreign-national criminal who was apprehended abroad pursuant to a legally valid indictment is entitled to sue our gov-

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[2] The United States has not in this petition asked this Court to review the Ninth Circuit's decision that Sosa is liable under the ATS because that judgment runs against (and thus aggrieves) only Sosa, not the United States. On September 25, 2003, however, the United States filed a brief as respondent supporting Sosa's petition in case No. 03-339.

> ernment for money damages. In so doing, and despite its protestations to the contrary, the majority has left the door open for the objects of our international war on terrorism to do the same.

Pet. App. 80a. The dissenting judges all agreed with the government's position that "the DEA was well within its delegated powers when arresting Alvarez." *Id.* at 103a (O'Scannlain, J., dissenting); *id.* at 120a n.7 (Gould, J. dissenting) ("I agree * * * that federal law authorized the DEA agents' conduct.").

The relevant statutory provisions, Judge O'Scannlain explained, confer on DEA agents the authority to "make arrests . . . *for any felony*, cognizable under the laws of United States" as well as authority to "perform such other law enforcement duties as the Attoney General may designate," without limiting geographic scope. Pet. App. 103a (quoting 21 U.S.C. 878(a)). "Because it is undisputed that Congress has authorized the extraterritorial application of the criminal statutes for which [respondent] was charged, this broad legislative delegation of enforcement powers to the DEA would seemingly sanction the extraterritorial arrests at issue in this case." *Ibid.* "Congress engaged in such a broad delegation of law enforcement authority to the DEA and to the Attorney General in order to allow the Executive branch to have the widest array of enforcement options at its disposal." *Id.* at 104a.

The majority's contrary decision, Judge O'Scannlain observed, leads to the anomalous result of a federal criminal prohibition that no Executive Branch official can enforce:

> [I]f Congress through enactment of 21 U.S.C. § 878(a) has not in fact authorized the DEA and Attorney General to enforce extraterritorially the criminal laws for which [respondent] was charged,

> to whom exactly has Congress delegated this enforcement authority? By extending the reach of our criminal laws to apply to conduct outside of the nation's borders, Congress must have intended to have the laws enforced by some member of the Executive branch.

Pet. App. 105a.

Congress thus "left to the Executive, which already possesses the general responsibility for deciding both when and whether to arrest and to prosecute and how best to conduct the nation's foreign relations, the burden of determining when the national interest requires bypassing diplomatic channels to secure" arrests abroad. Pet. App. 101a. Judge O'Scannlain concluded: "The decision to exercise the option of transborder arrest as a tool of national security and federal law enforcement is for the political branches to make. They, unlike the courts, may be held accountable for any whirlwind that they, and the nation, may reap because of their actions. By its judicial overreaching, the majority has needlessly shackled the efforts of our political branches in dealing with complex and sensitive issues of national security." *Id.* at 107a-108a.

In a separate dissent, Judge Gould concluded that the case "presents a nonjusticiable political question." Pet. App. 108a. He explained that the decision to order the capture of a foreign national on foreign soil involves delicate foreign policy questions, such as whether "the need to prosecute [respondent] for the torture and murder of an American official justif[ies] * * * actions that might offend Mexico's government?" *Id.* at 114a. By engaging that issue, he observed, "the majority transforms the executive branch's foreign policy decisions into occasions for judicial review." *Id.* at 117a. "[I]f the judiciary is to preserve its legitimacy, to show

the respect due coordinate branches of government, and to avoid interfering in our nation's foreign relations," he added, "judges must show more restraint than the majority shows today." *Id.* at 120a-121a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's en banc decision in this case declares that the United States may be held liable in damages for arresting a criminal suspect who was properly indicted by a grand jury on probable cause to believe that he participated in the torture and murder of a federal agent, simply because the arrest occurred in Mexico. In reaching that result, the Ninth Circuit held that federal officers charged with enforcing laws, including laws that expressly apply to conduct in foreign nations, cannot do so outside the United States. At the same time, the Ninth Circuit held that arrests that are allegedly unlawful *precisely because* they took place in a foreign nation are actionable under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, despite that statute's exclusion of "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k).

Those holdings are not merely incorrect. They have profound consequences for the Executive Branch's ability to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, and thereby to ensure the security of this Nation and its citizens. The statutory law enforcement authority that Congress gave DEA agents, like the authority given to other federal law enforcement agencies such as the Federal Bureau of Investigation, does not impose geographic limits. Nor does it require that arrests take place pursuant to a warrant. It thus is naturally read as granting the Executive Branch enforcement authority that extends as far as the laws it is charged with enforcing and wherever enforcement is deemed necessary and prudent.

The Ninth Circuit, however, concluded that federal agents lack statutory authority to engage in law enforcement activities outside the United States with or without the "consent or assistance of the host country." Pet. App. 35a & n.24. That holding threatens the government's ability to conduct necessary law enforcement operations abroad to combat terrorism, international crime, and the flow of illegal drugs into the United States. It provides terrorists or other criminals who hide in countries unwilling or unable to apprehend them using their own officers (including countries that are unwilling to acknowledge publicly their approval of U.S. actions) a safe harbor from federal law enforcement agencies, even though the criminals' actions are subject to United States law and have effects on the United States. Cf. *Steele* v. *Bulova Watch Co.*, 344 U.S, 280, 286-288 (1952). Finally, the Ninth Circuit's expansive view of the so-called "headquarters exception" effectively nullifies the FTCA's exclusion for "any claim arising in a foreign country," inappropriately intrudes into the Executive's control over foreign affairs, and opens the way for judicial supervision of the Executive's conduct of foreign policy and law enforcement activities abroad.

To be sure, the use of transborder arrests without foreign government consent to render criminal suspects is exceedingly rare. But judgments regarding the necessity of such measures—and the choice among law enforcement methods generally—are for the Executive Branch to make. It is precisely when criminals are harbored abroad that diplomatic, foreign policy, and law enforcement concerns overlap and must be balanced, and that the need for decisionmaking by the Executive Branch becomes paramount. That is the branch the Constitution charges with conducting the Nation's

foreign policy. See U.S. Const. Art. II, § 2. That is the branch the Constitution charges with "tak[ing] Care that the Laws be faithfully executed." *Id.* Art. II, § 3. And that is the branch that is diplomatically accountable abroad and politically accountable at home "for any whirlwind" that its actions may produce. Pet. App. 107a-108a.

1. a. Threats to the Nation's security and citizenry are now, more than ever, transnational phenomena. Individuals can, for example, commit crimes inside the United States and then retreat abroad. Increasingly, moreover, attacks on United States interests may be planned and even executed abroad. Recognizing as much, Congress has enacted criminal statutes that extend to extraterritorial conduct. Here, for example, respondent was indicted for kidnapping an internationally protected United States government employee in violation of 18 U.S.C. 1201 and 1203, statutes that expressly apply to acts outside the United States. Many similar criminal prohibitions apply extraterritorially as well. See, *e.g.*, 18 U.S.C. 1119 (murder of U.S. national in a foreign country); 18 U.S.C. 2332b (foreign terrorist activity); 18 U.S.C. 175 (extraterritorial use of biological weapons); 18 U.S.C. 351, 1751 (extraterritorial crimes committed against high government officials); 18 U.S.C. 1956 (extraterritorial money laundering); 18 U.S.C. 2339B (providing assistance to foreign terrorist organizations); 18 U.S.C. 1116(c) (attacks on diplomats); 18 U.S.C. 1203(b)(1) (hostage taking); 49 U.S.C. 46505 (carrying weapons or explosives aboard aircraft); 50 U.S.C. 424 (extraterritorial jurisdiction over crimes relating to releasing national security information).

The Executive Branch thus may sometimes determine that its constitutional obligation to "take Care that the Laws be faithfully executed" requires the per-

formance of law enforcement activities abroad. It is "beyond doubt * * * that Congress has the authority to 'enforce its laws beyond the territorial boundaries of the United States.'" *United States* v. *Yousef*, 327 F.3d 56, 86 (2d Cir. 2003) (quoting *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). Consistent with that, Congress has granted federal law enforcement officials broad authority to make arrests without a warrant for any felony, cognizable under the laws of the United States, on probable cause to believe the suspect committed the felony, without imposing territorial limits on their authority. Thus, 21 U.S.C. 878(a)(3), (5) gives DEA agents authority to "make arrests without warrant * * * *for any felony, cognizable under the laws of the United States*, if he has probable cause to believe that the person to be arrested has committed * * * a felony," and to "perform such other law enforcement activities as the Attorney General may designate." Similarly, 18 U.S.C. 3052 gives FBI agents the authority to "make arrests without warrant for any offense against the United States committed in their presence, *or for any felony cognizable under the laws of the United States* if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." Because many "felon[ies] cognizable under the laws of the United States" can arise under statutes that apply extraterritorially, those statutes by their terms give the agencies authority to enforce federal law abroad, and afford the Executive Branch the discretion to determine when and whether —in its conduct of foreign affairs—extraterritorial criminal law enforcement activities are appropriate.

To reach the contrary result, the Ninth Circuit invoked the general presumption against extraterritorial application of United States laws identified in cases

such as *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. at 248. But this Court has refused to apply that presumption to criminal statutes that logically should extend to acts abroad. See *United States* v. *Bowman*, 260 U.S. 94, 98 (1922) (explaining that "the general presumption against extraterritorial application" does not apply to those "criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction"); see also *Yousef*, 327 F.3d at 87-88. In light of *Bowman* and the fact that many criminal statutes expressly apply extraterritorially, the DEA's arrest authority is not a statute that is silent or ambiguous as to its extraterritorial effect. By expressly providing the authority to arrest "for *any felony*, cognizable under the laws of the United States," 21 U.S.C. 878(a)(3) provides for extraterritorial arrest authority with sufficient clarity to overcome the presumption against extraterritoriality.

In any event, *Bowman* suggests that the presumption has no application to a statute defining the authority to enforce federal criminal laws. The government's interest in enforcing its laws and bringing criminals to justice does not, as a logical matter, end at the Nation's borders. Nor does it terminate merely because the suspect flees or acts from abroad. To the contrary, Congress has made the international scope of law enforcement authority clear by enacting criminal prohibitions, like the ones at issue here, that apply to conduct committed wholly abroad. To conclude that United States law enforcement agencies nonetheless have no authority to conduct arrests outside the United States is to declare that Congress has chosen to create criminal laws applicable to conduct abroad, and to authorize arrests for *any felony*, but implicitly to deny the Executive Branch agencies charged with enforcing those

laws authority to secure arrests for any felony committed abroad.[3]

Congress was unquestionably aware of the broad enforcement discretion it granted by authorizing DEA agents to conduct arrests for any and all felonies cognizable under federal law, such as violations of 18 U.S.C. 1201(a), 1203. That arrest authority was intended to "provide[] the Attorney General with flexibility in the utilization of enforcement personnel *wherever and whenever the need arises.*" H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1, at 54 (1970) (emphasis added). And, in enacting later substantive criminal prohibitions that apply to conduct abroad, Congress contemplated their extraterritorial enforcement as well, with or without overt cooperation from foreign governments. See, *e.g.*, 131 Cong. Rec. 18,870 (1985) (Sen. Specter) (endorsing statute criminalizing the murder of U.S. nationals abroad, explaining that "if the terrorist is

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[3] Where Congress enacts laws of extraterritorial application but wishes to limit their extraterritorial enforcement, it has done so expressly. For example, under 46 U.S.C. App. 1903(a), it is "unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States, or who is a citizen of the United States or a resident alien of the United States on board any vessel, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance." In defining the vessels subject to the prohibition, Congress included a vessel on the high seas "registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States," and "a vessel located in the territorial waters of another nation, where the nation consents to the enforcement of United States law by the United States." 46 U.S.C. App. 1903(c)(1). This statute shows that where Congress wishes to limit the enforcement of its extraterritorial statutes to require the consent of another country, it does so clearly as part of the substantive criminal statute.

hiding in a country like Lebanon, where the government, such as it is, is powerless to aid in his removal, or in Libya, where the Government is unwilling, we must be willing to apprehend these criminals ourselves and bring them back for trial").[4]

By reading the DEA's expansive arrest authority as implicitly geographically limited, the Ninth Circuit's decision not only implausibly presumes that Congress meant to extend the reach of federal law abroad without corresponding enforcement power, but also presumes that Congress likewise meant to deny the Executive Branch authority to use its law enforcement powers whenever criminals commit offenses here but flee the Nation's borders. As the dissent in this case explained, "if Congress through enactment of 21 U.S.C. § 878(a) has not in fact authorized the DEA and Attorney General to enforce extraterritorially the criminal laws for which [respondent] was charged, to whom exactly has Congress delegated this enforcement authority? By extending the reach of our criminal laws to apply to conduct outside of the nation's borders, Congress must have intended to have the laws enforced by some member of the Executive branch." Pet. App. 105a.

The Ninth Circuit's invocation of international law in support of its narrow construction of the DEA's arrest

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[4] Congress similarly recognized the international nature of the drug trade that the DEA is charged with combating, directing that the "illegal traffic in drugs should be attacked with the full power of the Federal Government." H.R. Rep. No. 1444, *supra*, at 9; see *id.* at 18 (regulating drugs pursuant to Congress's "foreign commerce power"); *id.* at 78 (prohibition "intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States" if the drugs are to be imported into the United States); *id.* at 71-72 (enacting provisions governing importation of illegal drugs).

authority, see Pet. App. 38a, is likewise misplaced. Congress should not be presumed to hinder the Executive Branch's ability to make case-specific judgments about the proper degree of formal or informal foreign cooperation that is appropriate in apprehending a criminal. To the contrary, Congress presumably understands that the Executive Branch has principal responsibility for international relations, and Congress justifiably relies on the Executive Branch to carry out its functions with the requirements of international law in mind. *Department of the Navy* v. *Egan*, 484 U.S. 518, 529-530 (1988) (reiterating "the generally accepted view that foreign policy [is] the province and responsibility of the Executive") (quoting *Haig* v. *Agee*, 453 U.S. 280, 293-294 (1981)).

The Ninth Circuit's refusal to recognize extraterritorial arrest authority, in any event, sweeps more broadly than that court's international law rationale and ultimately proves too much. It is not a violation of international law for the Executive Branch to order the transborder arrest of a criminal suspect with the foreign country's consent, whether that consent is given publicly or confidentially. Yet the Ninth Circuit construed 21 U.S.C. 878 to deprive a federal agency of authority to conduct a transborder arrest even under those circumstances. Pet. App. 35a n.24. The more sensible reading is that Congress both granted the Executive broad authority to determine where and when to enforce federal law, and relied on the Executive Branch—the branch primarily responsible for foreign relations and primarily accountable to foreign nations—to take into account considerations such as international law.

The Ninth Circuit's reliance on avoiding international conflict, moreover, does not make sense on its own

terms. While the Ninth Circuit would bar the DEA from engaging in federal law enforcement activities (such as arrests) abroad, that court expressly permits the use of the *armed forces* to do the same. Pet. App. 3a; see *id.* at 80a-81a n.1 (O'Scannlain, J., dissenting); *id.* at 117a (Gould, J., dissenting). But the Ninth Circuit did not explain why the interest of preventing international strife would favor the use of military force rather than ordinary law enforcement officers.[5] Nor could it. By eliminating one option otherwise available to the Executive, namely the extraterritorial use of law enforcement agencies, the Ninth Circuit favored the use of another mechanism—the armed forces—that is less likely to be acceptable to foreign countries and more likely to create international strife.[6]

Extraterritorial enforcement efforts undertaken without overt consent from foreign governments are uncommon. The norm is to seek and obtain extradition or other cooperation from the foreign nation. Because extraterritorial arrests risk violating the territorial sovereignty of a foreign power, they may become the subject of international protest that must be handled as a matter of State-to-State relations. See *Alvarez-*

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[5] The Ninth Circuit likewise did not dispute that the Executive Branch has inherent authority to employ domestic law enforcement agents for national security functions abroad.

[6] Moreover, the Ninth Circuit's decision threatens to embroil courts adjudicating false arrest claims like this one in fine and difficult distinctions among military, national security, and law enforcement activities, or determining to which agency a particular arrest must be charged, matters for which the judiciary is ill-suited. See Pet. App. 80a-81a n.1 (O'Scannlain, J., dissenting); *id.* at 117a (Gould, J., dissenting). There is thus reason for concern that "the line the majority trie[d] to draw in limiting its decision is more illusory than real." *Id.* at 117a n.5 (Gould, J., dissenting).

Machain, 504 U.S. at 669.[7] As respondent's seizure demonstrates, there is sometimes a steep diplomatic price to be paid for exercising extraterritorial law enforcement power. See Pet. App. 25a-26a n.14 (discussing the diplomatic consequences). As the dissenting judges recognized, however, "[t]he decision to exercise the option of transborder arrest as a tool of national security and federal law enforcement is for the political branches" rather than the courts to make. *Id.* at 107a-108a. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (restriction on searches abroad "must be imposed by the political branches through diplomatic understanding, treaty, or legislation").[8]

b. The Ninth Circuit's decision in this case intrudes gravely on the Executive's prerogative and ability to enforce the laws and ensure national security through the means it finds most appropriate. The ruling does not merely bar DEA agents from enforcing United States law, but also casts doubt on the authority of FBI

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[7] There are a variety of negotiated State-to-State remedies for a State-sponsored transborder arrest when such a remedy is deemed necessary and appropriate. See Restatement (Third) of Foreign Relations Law § 432 & cmt. c (1986).

[8] The concurring judges argued that respondent's extraterritorial arrest was unlawful because it was not authorized by the President or Attorney General. The majority, however, held that the DEA lacks statutory authority for arrest outside the United States without regard to such high level authorization, and the statutes at issue here nowhere state that the President or Attorney General must authorize the exercise of the arrest authority abroad. Of course, where the Attorney General directs his subordinates not to conduct such arrests absent his express authorization, the violation of such a directive is a serious matter that may lead to discipline or other actions against the responsible subordinate. It does not, however, create judicially enforceable rights that may be asserted by individuals.

agents to do so. See p. 15, *supra*. Indeed, the reasoning the Ninth Circuit rejected in this case is precisely the analysis adopted by the Office of Legal Counsel in upholding the extraterritorial law enforcement and arrest authority of the FBI. See *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. Off. Legal Counsel 163 (1989), *available at* 1989 WL 595835. Thus, just when the importance of the fight against international terrorism (including drug cartel-funded narco-terrorism, see <http://www.dea.gov/pubs/cngrtest/ct052003.html>), and international computer crimes is at its apex, the Ninth Circuit's ruling draws into question the authority of the Nation's leading law enforcement agencies to combat those crimes and to bring to justice those who violate federal criminal statutes applicable to acts committed abroad. "The effective operation of government cannot condone the hiatus in the law that * * * construction would cause." *United States* v. *Cotten*, 471 F.2d 744, 750-751 (9th Cir.), cert. denied, 411 U.S. 936 (1973).

Notwithstanding their rarity, extraterritorial law enforcement actions without public cooperation by foreign governments are sometimes critical to the administration of justice and national security. See, *e.g.*, *Kasi* v. *Angelone*, 300 F.3d 487 (4th Cir.) (FBI arrest of fugitive in Pakistan who killed two CIA agents when seeking to assassinate the Director of the CIA), cert. denied, 537 U.S. 1025 (2002).[9] Thus, the Ninth Circuit's

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[9] Mir Aimal Kasi opened fire with an AK-47 on a line of cars waiting to enter CIA headquarters in Langley, Virginia, in an effort to kill the CIA Director; he killed two agents and wounded three others. Kasi then fled to Pakistan and successfully avoided capture by hiding near the border of Afghanistan. After he was indicted in the United States in 1997, FBI agents located and

ruling would appear to have precluded federal agents locating Osama Bin Laden in Afghanistan before (or after) the attacks of September 11, 2001, from exercising their law enforcement authority to seize him. And the decision likewise casts into doubt the efforts of United States law enforcement agencies to apprehend individuals who may be abroad, plotting other illegal attacks on United States interests.

Under the Ninth Circuit's decision, moreover, such arrests may be deemed unlawful (and require the United States to compensate the arrested suspect in money damages) even if undertaken *with* the express, tacit, or covert consent of the foreign nation. Pet. App. 35a n.24.[10] That undermines the ability of the United

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seized Kasi from Pakistan and transported him to the United States, where he was tried and convicted. Under the Ninth Circuit's decision, however, that arrest may well be deemed unlawful, whether or not Pakistan consented, protested, or cooperated actively or tacitly in the capture.

[10] The panel's vacated ruling read the arrest authority to extend abroad, but to require the consent of the foreign country where the arrest takes place. Pet. App. 144a. The en banc majority's opinion, however, simply holds as a matter of statutory construction that the federal officials do not have extraterritorial arrest power, and adopted a rule that the grant of such arrest power must be expressed by Congress. That ruling leaves in doubt whether federal law enforcement officials are authorized by statute to arrest a criminal suspect in a foreign country even with that country's express consent. *Id.* at 35a n.24. But even the textually implausible view of the now-vacated panel opinion—that the statute grants the DEA authority to conduct arrests abroad conditioned on foreign consent—places courts in the middle of potentially sensitive matters of foreign relations. Whether a foreign nation consented, protested, or cooperated actively or tacitly in the capture of criminals is not a proper matter for judicial inquiry. *Id.* at 99a-101a (O'Scannlain, J., dissenting). If another country has objections to the law enforcement efforts of the United States abroad, that is a

States even to work with foreign sovereigns for extradition or cooperation in arresting such individuals, eliminating the possibility of quiet or covert acquiescence in the use of DEA agents to effect an arrest.

It is hard to imagine that Congress intended that result. As this Court explained in *Verdugo-Urquidez*, "[s]ome who violate our laws may live outside our borders under a regime quite different from that which obtains in this country." 494 U.S. at 275. The Executive Branch must have the ability to respond to "[s]ituations threatening to important American interests [that] may arise half-way around the globe." *Ibid.* It must have the flexibility to respond with the tools that best balance foreign policy and law enforcement objectives, rather than being limited to the armed forces or nothing approach of the Ninth Circuit. Because the Ninth Circuit's en banc ruling creates a dangerous and untenable cloud of uncertainty over vital law enforcement efforts, review by this Court is plainly warranted.

2. While denying a federal law enforcement agency the authority to enforce federal law abroad, the Ninth Circuit accorded itself authority under the FTCA to pass on the propriety of foreign arrests notwithstanding the FTCA's express exclusion of "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k). The Ninth Circuit did not deny that, because the "foreign country" exclusion is a limit on "the scope of the United States' waiver of sovereign immunity," it must be construed strictly in favor of the United States. See *Smith* v. *United States*, 507 U.S. 197, 201, 203-204 (1993). Nor did the Ninth Circuit dispute that respondent's arrest took place in a foreign country. To the contrary, the only reason the court of appeals found the arrest of an

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matter for diplomatic resolution, which may be conducted outside public view.

indicted suspect on probable cause to be "false"—and thus tortious—was that it took place in Mexico.[11] The court, moreover, expressly agreed that liability began with respondent's seizure in Mexico, and ended when respondent was delivered into the United States. Pet. App. 60a-64a. Under the circumstances, the claim inescapably arose in a foreign country and thus is excluded from the scope of the FTCA.

To avoid that result, the Ninth Circuit held that the acts of DEA officials in the United States were the proximate cause of the false arrest in Mexico. This Court has explained, however, that the foreign country exception must be viewed together with 28 U.S.C. 1346, which "waives the sovereign immunity of the United States for certain torts committed by federal employees 'under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.*'" *Smith*, 507 U.S. at 201 (quoting 28 U.S.C. 1346(b)). Here, the allegedly tortious "act" of false arrest indisputably occurred in Mexico. The actions undertaken in the United States, in contrast, were not tortious. It is not a tort to procure the arrest of someone on probable cause that a felony has occurred, which is what the DEA agents did. The

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[11] In doing so, and invoking the so-called "headquarters doctrine," the Ninth Circuit followed its own precedent in *Nurse* v. *United States*, 226 F.3d 996 (2000), and cited decisions from other circuits, including *Sami* v. *United States*, 617 F.2d 755 (D.C. Cir. 1979), and *Couzado* v. *United States*, 105 F.3d 1389 (11th Cir. 1997). Those decisions, however, rob the FTCA's express foreign country exception of much of its force. Particularly in light of sovereign immunity principles and the separation of powers concerns raised by application of the FTCA to law enforcement conduct abroad, the so-called headquarters doctrine merits the Court's review and attention.

actual arrest in Mexico may have violated Mexican law and Mexican sovereignty, since the officers did not comply with Mexican legal requirements. But liability under the FTCA cannot be predicated on a violation of foreign law. See *United States* v. *Spelar*, 338 U.S. 217, 220-221 (1949) (Congress was "unwilling to subject the United States to liabilities depending upon the laws of a foreign power.").[12]

The Ninth Circuit's decision also creates one of the very consequences that Section 2680(k) is designed to avoid—judicial intervention into matters of foreign relations constitutionally reserved for the political branches. That error, moreover, pervades the court's decision. When determining the *judiciary's* authority under the FTCA, the Ninth Circuit construed the FTCA broadly to permit adjudication of the validity of an extraterritorial arrest, notwithstanding an express exception for claims arising abroad. When determining

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[12] The Ninth Circuit also denied federal officers the ability to conduct a "citizen's arrest," when they are acting outside of their statutory authority, even though non-officers can make such arrests on probable cause. See Pet. App. 70a-72a. Thus, even though an ordinary California citizen acting without statutory authority would commit no tort by arresting respondent on probable cause outside California, see *id.* at 184a-190a, federal officers acting in locations where they similarly have no statutory authority are deemed to commit a tort for conducting the identical arrest solely because they are federal officers. *Id.* at 71a-72a. Such rank discrimination against federal officers is impermissible, and in any event conflicts with the FTCA's direction that the government is subject to liability only to the extent a private person would be under like circumstances. For *constitutional* purposes, of course, federal officers are subject to restrictions that private citizens are not. But there is no basis for imposing common-law tort liability on federal officers for conducting arrests without statutory authority, where the same arrest would be privileged when conducted by a private citizen acting without government involvement.

whether the *judiciary* should impose liability under the FTCA for that foreign arrest, the Ninth Circuit applied state law broadly, holding an arrest in Mexico to be tortious through an extraterritorial application of California law. And when deciding the scope of the *judiciary's* authority to recognize causes of action under the ATS, the Ninth Circuit gave that statute a similarly broad and extraterritorial construction, holding that it permits courts to adjudicate, under international law, disputes between foreign nationals arising out of events taking place abroad. See U.S. Br. Supporting the Petition at 26-27 in *Sosa* v. *Alvarez Machain*, No. 03-339. But when passing on the scope of *Executive Branch* authority to conduct arrests and enforce federal law abroad under a statute that contains no express geographic limits, the Ninth Circuit invoked the presumption against extraterritorial application to deny the Executive Branch that authority—even though the laws the Executive is charged with enforcing by their very terms apply to conduct taking place abroad.

That gets it precisely backwards. In matters touching on foreign relations and law enforcement—whether, where, when and how to enforce federal law—Executive authority is at its apogee and judicial expertise at its nadir. See *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial," as they involve "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."); *Egan*, 484 U.S. at 529-530 ("[F]oreign policy [is] the province and responsibility of the Executive.") (quoting *Haig*, 453 U.S. at 293-294); *Haig*, 453 U.S. at 292 ("Matters intimately related

to foreign policy and national security are rarely proper subjects for judicial intervention."). And it is precisely to avoid judicial or private actions that would trench on the Executive's authority to conduct foreign relations that Acts of Congress are presumed not to have extraterritorial effect. No less than the Constitution, federal statutes that on their face *grant* the Executive Branch authority should not be construed to disrupt the ability of that Branch "to respond to foreign situations involving our national interest," *Verdugo-Urquidez*, 494 U.S. at 274, or to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3. Because the Ninth Circuit's decision inverts ordinary principles to maximize judicial authority in this area and minimize that of the Executive Branch, further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court, U.S.
FILED

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No.

OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONERS

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 99-56762, 99-56880

HUMBERTO ALVAREZ-MACHAIN, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; HECTOR BERELLEZ; BILL WATERS; PETE GRUDEN; JACK LAWN; ANTONIO GARATE-BUSTAMANTE; FRANCISCO SOSA, AND FIVE UNNAMED MEXICAN NATIONALS CURRENTLY IN THE FEDERAL WITNESS PROTECTION PROGRAM, DEFENDANTS-APPELLEES

HUMBERTO ALVAREZ-MACHAIN, PLAINTIFF-APPELLEE

v.

FRANCISCO SOSA, AND FIVE UNNAMED MEXICAN NATIONALS CURRENTLY IN THE FEDERAL WITNESS PROTECTION PROGRAM, DEFENDANT-APPELLANT

Argued and Submitted: June 11, 2001
Panel Opinion Filed: Sept. 11, 2001
Rehearing En Banc Granted: March 20, 2002
Argued and Submitted En Banc: June 18, 2002
Filed: June 3, 2003

Appeal from the United States District Court
for the Central District of California;
Stephen V. Wilson, District Judge,
Presiding. D.C. No. CV-93-04072-SVW-06

Before: SCHROEDER, Chief Judge, GOODWIN, O'SCANNLAIN, RYMER, KLEINFELD, THOMAS, MCKEOWN, FISHER, GOULD, PAEZ and TALLMAN, Circuit Judges.

Opinon by Judge MCKEOWN; Concurrence by Judge FISHER; Dissent by Judge O'SCANNLAIN; Dissent by Judge GOULD.

OPINION

MCKEOWN, Circuit Judge.

We must decide whether the forcible, transborder abduction of a Mexican national, Humberto Alvarez-Machain ("Alvarez"), by Mexican civilians at the behest of the Drug Enforcement Administration (the "DEA") gives rise to a civil claim under United States law. In an earlier, related proceeding, the Supreme Court acknowledged, without deciding, that Alvarez "may be correct" in asserting that his abduction was "shocking" and "in violation of general international law principles." *United States* v. *Alvarez-Machain*, 504 U.S. 655, 669, 112 S. Ct. 2188, 119 L. Ed. 2d 441 (1992). We now address the question left unanswered—whether there was a "violation of the law of nations," a predicate to federal court jurisdiction under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350. We also consider whether the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b)(1), 2671-2680, provides a remedy for this cross-border abduction.

In 1990, Mexican citizens acting on behalf of the DEA kidnapped Alvarez from his office in Mexico for his alleged involvement in the kidnapping and murder of an American DEA agent in Mexico. The arrest of Alvarez took place without an extradition request by the United

States, without the involvement of the Mexican judiciary or law enforcement, and under protest by Mexico. Alvarez was brought to the United States, stood trial on criminal charges, and was acquitted. He then sued his former captors, the United States, and the DEA agents, asserting a panoply of common law and constitutional torts arising from his abduction.

This case, which has been litigated in one form or another for more than a decade, involves important issues of international law and sovereignty. It also implicates our country's relations with Mexico, our neighbor to the South and an important ally and trading partner. The questions it raises, particularly with regard to the Executive's power to carry out law enforcement operations abroad, perhaps resonate to a broader audience today than when the case began. In the midst of contemporary anxiety about the struggle against global terrorism, there is a natural concern about the reach and limitations of our political branches in bringing international criminals to justice.

But we need not delve into the legal quagmire of apprehending terrorists or even resolve many of the complex issues spawned by this international abduction dispute. Nor is it within our province to address the policy and diplomatic issues associated with trans-border kidnapping. Rather, this appeal presents only the narrow question whether Alvarez has a remedy at law under the ATCA and the FTCA for a violation of the "law of nations."

More precisely, we must determine the statutory authority of a single federal agency—the DEA—to make a warrantless arrest outside the borders of the United States and, if the agency lacks that authority, whether Alvarez has a remedy at law under the ATCA

or the FTCA. After a careful review of the relevant statutes, we conclude that the DEA had no authority to effect Alvarez's arrest and detention in Mexico, and that he may seek relief in federal court.

Whatever the contours of the powers of the political branches during wartime or in matters of national security, the exercise of those powers in the combat against terrorism are not implicated in our analysis. Our holding today, that Alvarez may pursue civil remedies for actions taken against him more than ten years ago by the DEA and its agents, is a limited one. It does not speak to the authority of other enforcement agencies or the military, nor to the capacity of the Executive to detain terrorists or other fugitives under circumstances that may implicate our national security interests. The Fourth Circuit recently underscored this distinction when it recognized, in approving the detention of an American citizen captured abroad and designated as an "enemy combatant," that it was "not . . . dealing with a defendant who has been indicted on criminal charges in the exercise of the executive's law enforcement powers" but rather "with the executive's assertion of its power to detain under the war powers of Article II." *Hamdi* v. *Rumsfeld*, 316 F.3d 450, 473 (4th Cir. 2003). We, by contrast, are dealing with the former, not the latter.

BACKGROUND

In February 1985, DEA Special Agent Enrique Camarena-Salazar ("Camarena") was abducted and brought to a house in Guadalajara, Mexico, where he was tortured and murdered. Alvarez, a Mexican citizen and a medical doctor who practices in Guadalajara, was present at the house.

Five years after Camarena's death, a federal grand jury in Los Angeles indicted Alvarez for participating in the scheme, and the United States District Court for the Central District of California issued a warrant for his arrest. The United States negotiated with Mexican government officials to take custody of Alvarez, but made no formal request to extradite him. Instead, DEA headquarters in Washington, D.C., approved the use of Mexican nationals, who were not affiliated with either government, to arrest Alvarez in Mexico and to bring him to the United States.

The DEA agent in charge of the Camarena murder investigation, Hector Berellez ("Berellez"), with the approval of his superiors in Los Angeles and Washington, hired Antonio Garate-Bustamante ("Garate"), a Mexican citizen and DEA operative, to contact Mexican nationals who could help apprehend Alvarez. Through a Mexican intermediary, Ignacio Barragan ("Barragan"), Garate arranged for Jose Francisco Sosa ("Sosa"), a former Mexican policeman, to participate in Alvarez's apprehension. Barragan told Sosa that the DEA had obtained a warrant for Alvarez's arrest, would pay the expenses of the arrest operation, and, if the operation was successful, would recommend Sosa for a position with the Mexican Attorney General's Office.

On April 2, 1990, Sosa and others abducted Alvarez from his office and held him overnight at a motel. The next day, they flew him by private plane to El Paso, Texas, where federal agents arrested him. Alvarez was later arraigned and transported to Los Angeles for trial. He remained in federal custody from April 1990 until December 1992.

Alvarez moved to dismiss the indictment, arguing that the federal courts lacked jurisdiction to try him because his arrest violated the United States-Mexico Extradition Treaty. Both the district court and this court agreed, *see United States* v. *Alvarez-Machain ("Alvarez-Machain I")*, 946 F.2d 1466, 1466-67 (9th Cir. 1991) (per curiam), *aff'g United States* v. *Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990), but the Supreme Court reversed and remanded the case for trial. *See United States* v. *Alvarez-Machain ("Alvarez-Machain II")*, 504 U.S. at 669-70, 112 S. Ct. 2188.

The Supreme Court held that Alvarez's arrest did not violate the United States-Mexico Extradition Treaty. Applying the doctrine announced in *Ker* v. *Illinois*, 119 U.S. 436, 7 S. Ct. 225, 30 L.Ed. 421 (1886), the Court held that a court retains its power to try a person for a crime even where the person has been brought within the court's jurisdiction by forcible abduction. *Alvarez-Machain II*, 504 U.S. at 670, 112 S. Ct. 2188. Significantly, however, the Court noted that Alvarez's abduction "may be in violation of general international law principles" and did not foreclose Alvarez from later pursuing a civil remedy. *See id.* at 669, 112 S. Ct. 2188; *see also Ker*, 119 U.S. at 444, 7 S. Ct. 225 (stating that "[t]he [kidnapped] party himself would probably not be without redress, for he could sue [the kidnapper] in an action of trespass and false imprisonment, and the facts set out in the plea would without doubt sustain the action").

Following the Supreme Court's ruling, the case proceeded to trial in 1992. After the presentation of the government's case, the district judge granted a motion for judgment of acquittal on the ground that the government had adduced insufficient evidence to support a

guilty verdict. The court concluded that the case against Alvarez was based on "suspicion and . . . hunches but . . . no proof," and that the government's theories were "whole cloth, the wildest speculation."

In 1993, after returning to Mexico, Alvarez filed this action against Sosa, Garate, five unnamed Mexican civilians, the United States, and four DEA agents. The amended complaint alleged a number of conventional and constitutional torts.[1]

The district court substituted the United States for the DEA agents, except Sosa and Garate, on all non-constitutional claims. The parties later stipulated to the substitution of the United States for Garate. Sosa's interlocutory appeal on the substitution motion was dismissed for lack of appellate jurisdiction. *See Alvarez-Machain* v. *United States ("Alvarez-Machain III")*, 107 F.3d 696, 700 n.2 (9th Cir. 1997) (as amended).

In *Alvarez-Machain III*, we also affirmed the district court's dismissal of the constitutional claims arising out of harms suffered by Alvarez in Mexico, the denial of the DEA agents' defense based on qualified immunity, and the denial of the United States' defense that the FTCA claims were time-barred. We reversed the district court's dismissal of a claim under the Torture Vic-

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[1] Specifically, Alvarez alleged the following conventional tort claims: (1) kidnapping; (2) torture; (3) cruel, inhuman, and degrading treatment or punishment; (4) arbitrary detention; (5) assault and battery; (6) false imprisonment; (7) intentional infliction of emotional distress; (8) false arrest; (9) negligent employment; and (10) negligent infliction of emotional distress. Alvarez alleged constitutional torts under the Fourth, Fifth, and Eighth Amendments for the acts of kidnapping, torture, cruel and inhuman and degrading treatment or punishment, denial of adequate medical treatment, and arbitrary detention.

tims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73. 107 F.3d at 703-04.[2]

Upon remand, the district court entered summary judgment for Alvarez on his claims against Sosa for kidnapping and arbitrary detention under the ATCA. The court held that both state-sponsored, transborder abductions and arbitrary detentions violated customary international law.[3] The court granted summary judgment to the United States, however, on Alvarez's FTCA claims, concluding that Alvarez's apprehension was privileged and was not a false arrest under California law.

These rulings left for resolution the question of Sosa's liability on the remaining tort claims, as well as the calculation of damages on the kidnapping and arbitrary detention claims. After a bench trial, the district court found for Sosa on all remaining claims and held that Alvarez could recover damages under the ATCA only for his detention in Mexico prior to his arrival in the United States. The court applied federal common law, rather than Mexican law, for the calculation of damages and awarded Alvarez $25,000.

These consolidated appeals followed. Sosa appeals the judgment against him, claiming that the district court erred in allowing a cause of action under the ATCA and in applying federal common law, rather than Mexican law, for the calculation of damages. On the

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[2] The constitutional claims under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), and the Torture Act claim are no longer at issue.

[3] The district court found that a third claim brought by Alvarez under the ATCA for cruel, inhuman, and degrading treatment was barred by the law of the case.

ATCA claims, Alvarez appeals the district court's substitution of the United States for the DEA agents and the limitation of damages to those suffered during his imprisonment in Mexico. He also appeals the dismissal of his FTCA claims.

A three-judge panel of this court affirmed Sosa's liability on the ATCA claims, upheld the substitution and damages rulings under ATCA, and reversed the dismissal of Alvarez's FTCA claims. *Alvarez-Machain* v. *United States ("Alvarez-Machain IV")*, 266 F.3d 1045, 1064 (9th Cir. 2001), *reh'g en banc granted*, 284 F.3d 1039, 1040 (9th Cir. 2002).

DISCUSSION

I. ALIEN TORT CLAIMS ACT—JURISDICTION AND CAUSE OF ACTION

The ATCA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Although enacted in 1789 as part of the first Judiciary Act, the ATCA received little attention until 1980,[4] when the Second Circuit, in a comprehensive analysis of the statute, held that the ATCA provided subject matter jurisdiction over an action brought by Paraguayan citizens for torture—a violation of the law

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[4] In 1975, Judge Friendly remarked that the statute had been invoked so rarely since its inception that it existed as "a kind of legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know whence it came." *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (noting the paucity of cases under the Act and holding that no jurisdiction existed under the Act for fraud and securities claims against foreign corporations).

of nations—committed in Paraguay. *See Filartiga* v. *Pena-Irala (Filartiga I)*, 630 F.2d 876 (2d Cir. 1980).

Since the *Filartiga I* decision, the ATCA has been invoked in a variety of actions alleging human rights violations. *See, e.g., Abebe-Jira* v. *Negewo*, 72 F.3d 844 (11th Cir. 1996) (affirming judgment under ATCA against former Ethiopian official for torture and cruel, inhuman, and degrading treatment); *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995) (concluding that alleged war crimes, genocide, torture, and other atrocities committed by a Bosnian Serb leader were actionable under the ATCA); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (dismissing for lack of subject matter jurisdiction claims brought against the Palestine Liberation Organization, the Libyan government, and other entities for terrorist activities allegedly in violation of the law of nations); *Xuncax* v. *Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (deeming torture, summary execution, "disappearance," and arbitrary detention by Guatemalan military to be actionable violations under the ATCA).

Our first opportunity to address the scope of the ATCA came in *Trajano* v. *Marcos (In re Estate of Marcos Human Rights Litig.) ("Marcos I")*, 978 F.2d 493 (9th Cir. 1992), a wrongful death action against former Philippine President Ferdinand Marcos and his daughter for the torture and murder of a Philippine citizen. We recognized that "it would be unthinkable to conclude other than that acts of official torture violate customary international law," and concluded that the plaintiff, an alien, had properly invoked the subject matter jurisdiction of the federal courts under the ATCA. *Id.* at 499 (citation and internal quotation marks omitted). Referencing an April 1787 letter from

James Madison to Edmond Randolph, we concluded that "[t]here is ample indication that the 'Arising Under' Clause was meant to extend the judicial power of the federal courts . . . to 'all cases which concern foreigners.'" *Id.* at 502. Because the "Arising Under" Clause gave Congress the power to enact the ATCA, we held that exercising jurisdiction over the claims would not run afoul of Article III of the Constitution. *Id.* at 502-03.

When the Marcos litigation returned to this court in *Hilao* v. *Estate of Marcos (In re Estate of Marcos, Human Rights Litig.) ("Marcos II")*, 25 F.3d 1467 (9th Cir. 1994), we further delineated the contours of the ATCA.[5] We resolved that the Act not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations: "[S]ection 1350 does not require that the action 'arise under' the law of nations, but only mandates a 'violation of the law of nations' in order to create a cause of action." *Id.* at 1475 (quoting *Tel-Oren*, 726 F.2d at 779 (Edwards, J., concurring)). In other words, "[n]othing more than a violation of the law of nations is required to invoke section 1350." *Id.* (citation omitted).

Of course, not every violation of international law constitutes an actionable claim under the ATCA. In *Marcos II*, we were careful to limit actionable violations to those international norms that are "specific, universal, and obligatory." *Id.* at 1475. This formulation, which lays the foundation for our approach to interna-

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[5] Following *Marcos II*, we issued several other decisions in relation to the Marcos litigation, two of which are referenced in this opinion: *Hilao* v. *Estate of Marcos ("Marcos III")*, 103 F.3d 767 (9th Cir. 1996) and *Hilao* v. *Estate of Marcos ("Marcos IV")*, 103 F.3d 789 (9th Cir. 1996).

tional norms, is in keeping with the narrow scope of ATCA jurisdiction and the general practice of limiting judicial review to those areas of international law that have achieved sufficient consensus to merit application by a domestic tribunal. *See Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 428, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964) ("[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . ."); *cf. United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 162, 5 L.Ed. 57 (1820) (finding piracy "universally treat[ed] . . . as an offence against the law of nations" and "sufficiently and constitutionally defined" by commentators to be punishable by Congress).

Sosa urges a narrow reading of the "law of nations" and a correspondingly strict interpretation of the "specific, universal, and obligatory" requirement. He argues that only violations of *jus cogens* norms, as distinguished from violations of customary international law, are sufficiently "universal" and "obligatory" to be actionable as violations of "the law of nations" under the ATCA. We decline to embrace this restrictive reading, as we are guided by the language of the statute, not an imported restriction.

The term *jus cogens* refers to a category of "peremptory norms" that are " 'accepted and recognized by the international community of states as a whole as . . . norm[s] from which no derogation is permitted.'" *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (quoting Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679). Customary international law, a direct descendent of the "law of nations," is a re-

lated, but distinct, concept. *Id.* It refers more generally to those established norms of contemporary international law that are "ascertain[ed] . . . 'by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" *Id.* at 714-15 (quoting *Smith*, 18 U.S. at 160-61). We have explained the difference between these two concepts as follows:

> While *jus cogens* and customary international law are related, they differ in one important respect. Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states. A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm
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> . . . .
>
> In contrast, *jus cogens* embraces customary laws considered binding on all nations and is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations. Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent . . . .
>
> Because *jus cogens* norms do not depend solely on the consent of states for their binding force, they enjoy the highest status within international law.

Id. at 715 (internal quotation marks and citations omitted).[6]

Given the non-derogable nature of *jus cogens* norms, it comes as no surprise that we have found that a *jus cogens* violation is sufficient to satisfy the "specific, universal, and obligatory" standard. *See Marcos II*, 25 F.3d at 1475. But the fact that a violation of this subcategory of international norms is *sufficient* to warrant an actionable claim under the ATCA does not render it *necessary*. Indeed, our recent cases lay out the components of an actionable violation without reference to *jus cogens*. *See Papa* v. *United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) (remanding case to district court to apply the "applicable standard," which requires plaintiffs to allege "specific, universal, and obligatory" norms as part of their claim); *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1383-84 (9th Cir. 1998) (recognizing, without a discussion of *jus cogens*, that arbitrary detention meets the standard for a cognizable ATCA claim).

The notion of *jus cogens* norms was not part of the legal landscape when Congress enacted the ATCA in 1789. *See Brownlie*, *supra*, at 516 (explaining the modern evolution of *jus cogens*). Thus, to restrict actionable violations of international law to only those claims that fall within the categorical universe known as *jus*

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[6] The commentators embrace this distinction. *See* 1 M. Cherif Bassiouni, *International Criminal Law* 40 (2d ed. 1999) ("[A] *jus cogens* norm holds the highest hierarchical position among all other norms and principles. As a consequence of that standing, *jus cogens* norms are deemed to be 'peremptory' and 'non-derogable.'"); Ian Brownlie, *Principles of Public International Law* 515 (5th ed. 1998) ("The major distinguishing feature of [*jus cogens*] rules is their relative indelibility.").

cogens would deviate from both the history and text of the ATCA.

Although a strict categorical approach may have surface appeal for its apparent ease of application, it is far from certain which norms would qualify for *jus cogens* status. The development of an elite category of human rights norms is of relatively recent origin in international law, and "[a]lthough the concept of *jus cogens* is now accepted, its content is not agreed." Restatement (Third) of the Foreign Relations Law of the United States § 102 n. 6 (1987) ("Restatement on Foreign Relations"). As one respected commentator put it, "more authority exists for the category of *jus cogens* than exists for its particular content . . . ." *Brownlie, supra,* at 516-17; *see also* Theodor Meron, *On a Hierarchy of International Human Rights,* 80 A.J.I.L. 1, 14-15 (1986) (explaining the difficulties of strict categorization in defining peremptory norms). We therefore remain confident that the standard established in *Marcos II* and repeated throughout our case law best reflects the text and purpose of the ATCA and provides sufficient guidance for evaluating Alvarez's claim.

With this international law background in mind, we turn to Alvarez's contentions on appeal. Alvarez argues that he has a remedy under the ATCA for two separate violations of international law. First, he claims that state-sponsored abduction within the territory of another state without its consent is a violation of the international law of sovereignty and the customary norms of international human rights law. Second, he contends that his seizure and confinement violated the international customary legal norm against arbitrary arrest and detention.

In view of the dissent's rhetoric and lengthy discourse, it may not be readily apparent that the dissent is in accord with a significant portion of our holding. Ten members of the en banc court agree that Alvarez lacks standing to obtain redress for claims based on an alleged violation of Mexico's sovereignty and that his claim for transborder abduction fails.[7] These same judges also agree that there is a universally recognized norm prohibiting arbitrary arrest and detention. It is only as to the application of this latter norm that we part company.

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[7] Judge Gould's solitary dissent on the political question issue misses the mark, as the other dissenters acknowledge. *See infra* at n.2 (O'Scannlain, J., dissenting). The mere fact that this case raises difficult and politically sensitive issues connected to our foreign relations does not preclude us from carrying out the legislative mandate of Congress under § 1350. *See Baker* v. *Carr*, 369 U.S. 186, 211, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) ("[I]t is error to suppose that every case or controversy which touches upon foreign relations lies beyond judicial cognizance."). The crux of the claim here rests on legislative delegation, not foreign relations. We see a critical distinction between, on the one hand, second guessing the foreign policy judgments of the political branches to whom such judgments have been constitutionally assigned and, on the other hand, reviewing claims based in tort and brought under federal statutes instructing the judiciary to adjudicate such claims. *See Kadic*, 70 F.3d at 249 ("The department to whom this [tort suit against the PLO] has been constitutionally committed is none other than our own—the Judiciary.") (internal quotation marks and citation omitted); *Abebe-Jira*, 72 F.3d at 848 (holding that the political question doctrine did not bar tort action brought by former prisoners in Ethiopia under the ATCA).

A. TRANSBORDER ABDUCTION AND THE LAW OF NATIONS

1. STANDING AND SOVEREIGNTY

Alvarez claims that his arrest violated Mexico's sovereign rights because Mexico had not granted the United States permission to exercise police power on its soil. Because such an encroachment on Mexico's sovereignty violates "the law of nations" within the meaning of the ATCA, Alvarez reasons, he is entitled to relief under that statute. The district court agreed and rejected Sosa's objection that Alvarez lacks standing to invoke Mexico's sovereignty rights.

We have little trouble accepting the premise from which Alvarez begins. Few principles in international law are as deeply rooted as the general norm prohibiting acts of sovereignty that offend the territorial integrity of another state. *See generally* 1 L. Oppenheim, *Oppenheim's International Law* § 119 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); *see also* F.A. Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law, in International Law at a Time of Perplexity* 407 & n.2 (Yoram Dinstein & Mala Tabory eds. 1989) (referring to this "incontrovertible" rule as "elementary"). This tenet, as Alvarez points out, can be traced to the earliest decisions of the Supreme Court. Most notably, in 1812, when faced with the question whether an American citizen could assert title to an armed French vessel found in the territorial waters of the United States, Justice Marshall began his landmark decision by emphasizing the "exclusive and absolute" nature of territorial jurisdiction, exceptions to which "must be traced up to the consent of the nation itself." *Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116, 136, 3 L.Ed. 287 (1812).

Twelve years later, Justice Story voiced similar sentiments. Analyzing an American seizure of a foreign ship that had sailed into Spanish waters, he observed that "[i]t would be monstrous to suppose that our . . . officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations." *The Apollon*, 22 U.S. (9 Wheat.) 362, 371, 6 L.Ed. 111 (1824).

Alvarez seeks to invoke a principle, concomitant with this precept of territorial sovereignty, that prohibits a state's law enforcement agents from exercising their functions in the territory of another state without the latter's consent. The Supreme Court clearly recognized this proscription in *The Appollon*. In addition, several notable authorities are in accord. *See* Restatement on Foreign Relations § 432(2) ("A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state."); 1 Oppenheim, *supra*, § 119, at 387-88 ("It is . . . a breach of international law for a state without permission to send its agents into the territory of another state to apprehend persons accused of having committed a crime."); *see also* M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 255 (4th ed. 2002) (recognizing the rule and noting that it is "grounded in the notion that international law is designed to protect the sovereignty and territorial integrity of states by restricting impermissible state conduct"). But whatever the modern contours of this principle or its corollaries, they are inapplicable here and need not be explored because Alvarez cannot

establish, as a threshold matter, that he has standing to assert Mexico's interests in its territorial sovereignty.[8]

The Supreme Court has instructed that to meet the "irreducible constitutional minimum of standing" under Article III, plaintiffs must "[f]irst and foremost" show the existence of an "injury in fact." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102-03, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (internal citations and quotation marks omitted). Related to this constitutional prerequisite is a separate "prudential" requirement of standing: plaintiffs must demonstrate they are "proper proponents of the particular legal rights on which they base their suit." *Singleton* v. *Wulff*, 428 U.S. 106, 112, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976). This requirement applies "even when the very same allegedly illegal act that affects the litigant also affects a third party." *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715, 720, 110 S. Ct. 1428, 108 L. Ed. 2d 701 (1990). Although Alvarez may have properly alleged that Mexico's sovereignty was infringed during his abduction

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[8] Although we need not examine the place of such a rule in customary international law or as it applies to this case, we note that Alvarez's assertion is not wholly straightforward, as it raises complex questions about the intersection of extraterritorial criminal jurisdiction, extraterritorial enforcement, and state sovereignty. The three concepts are not necessarily correlative as a matter of international law. *See, e.g., S.S. Lotus* (Turk. v. Fr.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7) ("The territoriality of criminal law . . . is not an absolute principle of international law and by no means coincides with territorial sovereignty."). And although extraterritoriality is well-established in our jurisprudence, *see infra* Part I.B., to the extent that either extraterritorial jurisdiction or extraterritorial enforcement overlap with the national laws and policies of another state, inevitably there is a potential for friction between states. *See Bassiouni, International Extradition, supra*, at 314 n.1.

—an issue we need not resolve here—he has not demonstrated that he is a proper party to vindicate Mexico's national interests.

Alvarez argues that he meets the standing requirements because courts may review ATCA claims whenever an alien "is injured tortiously in the course of the defendant's violation of international law." But the ATCA creates a remedy for "a tort . . . committed in violation of the law of nations," not "in the course of" any recognized international law violation. 28 U.S.C. § 1350. The legal rights on which Alvarez bases his claim, and which the ATCA recognizes, are those that protect the individual from tortious conduct. By its terms, the ATCA provides only for suits by individual aliens; it does not allow for *an individual* to vindicate the rights of a foreign government.

To allow state-on-state injuries like the one Alvarez alleges here to be vindicated by a third party not only would read too much into the ATCA, but would lead to the judiciary's intrusion into matters that are appropriately reserved for the Executive branch. Although international human rights litigation under the ATCA inevitably raises issues implicating foreign relations, sovereigns' prerogatives are ordinarily and traditionally handled through diplomatic channels.[9] The right of

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[9] We do not mean to imply that an individual never has a claim for breach of the law of nations for which a state-to-state remedy also exists. *See* Restatement on Foreign Relations § 703(1) (establishing states' rights to take action against fellow states that transgress international human rights norms). We note, however, that the commentary of the Restatement on Foreign Relations indicates that most state-to-state remedies are subordinated to individual remedies where transgressor states' domestic law makes such remedies available. *See id.* §§ 703 cmt. d, 713 cmt. f.

a nation to invoke its territorial integrity does not translate into the right of an individual to invoke such interests in the name of the law of nations.

Alvarez seeks refuge in *Ker* v. *Illinois*, 119 U.S. 436, 7 S. Ct. 225, 30 L.Ed. 421 (1886), the case that previously doomed his attempt to secure dismissal of his criminal indictment. *See Alvarez-Machain II*, 504 U.S. at 662, 112 S. Ct. 2188. Like Alvarez, Ker claimed forcible abduction from a foreign country, in his case Peru. Although the Supreme Court refused to dismiss Ker's indictment, it observed that Ker was "probably not . . . without redress, for he could sue [his abductor] in an action of trespass and false imprisonment." *Ker*, 119 U.S. at 444, 7 S. Ct. 225. The Court made no guarantees, however, regarding a claim under the ATCA or any other federal statute; nor did it intimate that Ker could sue to avenge Peru's sovereignty rights. Rather, the Court noted that Peru could pursue a separate remedy—the kidnapper's extradition. *Id.* *Ker* thus implicitly drew the distinction between vindication of individual rights and a sovereign's vindication of its rights. *Ker* does not bridge the gap in Alvarez's claim.

2. TRANSBORDER ABDUCTION AND CUSTOMARY INTERNATIONAL LAW

Apparently cognizant of the constitutional barrier to his claim, Alvarez offers an alternative theory: he seeks to bypass the standing hurdle by arguing that, notwithstanding any infringements upon Mexico's sovereignty, the act of transborder kidnapping was, in itself, a violation of customary international human rights law. This norm, as defined by Alvarez, creates a *personal* right under the law of nations.

Sosa, the DEA agents, and the United States all urge that this norm fails the law of nations test. They contend that the prohibition that Alvarez identifies has not reached the level of acceptance in the international community sufficient to qualify as "universal" and "obligatory." They also argue that, whatever degree of agreement other nations have reached, the United States has affirmatively and definitively rejected this principle. We agree. The United States does not recognize a prohibition against transborder kidnapping, nor can it be said that there is international acceptance of such a norm.

We embrace the Supreme Court's directive that the law of nations "may be ascertained by consulting the work of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *Smith*, 18 U.S. at 160-61; *see also The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 44 L.Ed. 320 (1900) ("[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators . . . ."). Evidence of the law of nations may also be garnered from international agreements and United Nations declarations. *See Siderman*, 965 F.2d at 716-17; *Filartiga I*, 630 F.2d at 883-84.

Article 38 of the Statute of the International Court of Justice serves as a convenient summary of the sources of international law, although we recognize that defining "[t]he 'sources' of international law is a subject of much continuing scholarship." *United States* v. *Yousef*, 327 F.3d 56, 100-01 (2d Cir. 2003).

Article 38 provides, in part:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
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> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
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> b. international custom, as evidence of a general practice accepted as law;
>
> c.the general principles of law recognized by civilized nations;
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> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[10]

Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, U.S.T.S. 993.

International agreements to which the United States is a signatory provide an obvious and convenient starting point. It would be, of course, a relatively simple analysis if we could pinpoint in such an agreement a prohibition against transborder abductions. Despite eloquent arguments to the contrary, we find no such support in the text of any international agreement.

Alvarez and the amici point to a number of international human rights instruments which, they argue, support an individual right to remain free of transborder abductions. But no authority cited by Alvarez

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[10] Article 59 states: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

recognizes an explicit prohibition against forcible abduction.[11] Rather, each of the authorities speaks to general prohibitions against restricting an individual's right to freedom and movement and security of person. For example, the American Convention on Human Rights ("American Convention"), which Alvarez cites, states that "[e]very person has the right to personal liberty and security" and "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto." Art. 7(1), 7(2), *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123 (signed but not ratified by the United States). Similarly, the International Covenant on Civil and Political Rights ("ICCPR") provides that "[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." Art. 12, G.A. Res. 2200, 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ratified by the United States Sept. 8, 1992). *See also* Universal Declaration of Human Rights ("Universal Declaration"), art. 13(1), G.A. Res. 217A (III), 3 U.N. GAOR, Supp. No. 16, U.N. Doc. A/810 (1948) ("Everyone has the right to freedom of movement and residence within the borders of each state.");[12] American Declaration of

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[11] The Restatement on Foreign Relations reflects this void: "None of the international human rights conventions to date . . . provides that forcible abduction or irregular extradition is a violation of international human rights law." Restatement on Foreign Relations § 432 n.1.

[12] We have recognized that the Universal Declaration, although not binding on states, constitutes "a powerful and authoritative

the Rights and Duties of Man, art. VIII, May 2, 1948, O.A.S. Res. XXX, *reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.LV/II. 82 doc. 6 rev. 1, at 17 (1992) ("Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will."). Such general prohibitions are insufficient to support Alvarez's claim that there is an international norm against transborder abduction because an actionable claim under the ATCA requires the showing of a violation of the law of nations that is "specific, universal, and obligatory."

Looking beyond the declarations and covenants to treaties does not yield a different result.[13] At the time of Alvarez's abduction, the United States-Mexico Extradition Treaty did not extend to transborder abduction and there was no separate treaty with such a prohibition. *See Alvarez-Machain II*, 504 U.S. at 669-70, 112 S. Ct. 2188. The absence of any agreement is consistent with our conclusion that the United States has not embraced the prohibition urged by Alvarez. That is not to say that Alvarez's abduction went unnoticed. Indeed, it was met with a formal diplomatic protest by Mexico and considerable public outcry.[14]

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statement of the customary international law of human rights." *Siderman*, 965 F.2d at 719.

[13] The ATCA permits suits for both a "violation of the law of nations" and torts in violation of "a treaty of the United States." 28 U.S.C. § 1350.

[14] The Mexican Government filed an official protest with the United States, presenting a diplomatic note to the U.S. Department of State on three separate occasions. *See* Brief for the United Mexican States as Amicus Curiae in Support of Affirmance

In 1994, four years after Alvarez was abducted, the United States and Mexico reached an agreement to prohibit the practice of transborder arrest. Treaty to Prohibit Transborder Abductions, Nov. 23, 1994, U.S.-Mex., *reprinted in* Michael Abbell, *Extradition to and From the United States*, at A-303 (2002). That agreement is not yet in force, however, because the President has not submitted it to the Senate for its advice and consent. *See id.* at A-287. In any event, the proposed treaty would not help Alvarez: it would explicitly foreclose the right of abductees to sue their abductors. *See id.* at A-303. If anything, this development underscores the void that existed before the treaty was signed and the reality that the United States does not yet consider itself bound by the supposed norm against transborder abductions. Alvarez offers no other legislative or judicial source that supports a specific, enforceable norm against transborder abductions.

The United States claims that unilateral, transborder abductions are a "rare" occurrence. And the notion of sneaking across the border to nab a criminal suspect surely raises more than a diplomatic eyebrow. Nonetheless, our review of the international authorities and literature reveals no specific binding obligation, express or implied, on the part of the United States or its agents to refrain from transborder kidnapping. Nor

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at 3-4, *Alvarez-Machain II*, *reprinted in* 31 I.L.M. 934, 938-39 (1992); *see also Caro-Quintero*, 745 F. Supp. at 604. The resulting friction between the United States and Mexico was well documented. *See, e.g.*, Marjorie Miller & Douglas Jehl, *Mexico to Confront U.S. on Camarena Case Abduction*, L.A. Times, April 18, 1990, at A1; Carlyle C. Douglas, *Arm of U.S. Law Is Too Long, Mexico Complains*, N.Y. Times, April 22, 1990, § 4, at 11; Jack Epstein, *Growing Uproar in Mexico About Alleged Abuses by U.S.*, S.F. Chron., July 7, 1992, at A8.

can we say that there is a "universal" consensus in the sense that we use that term to describe well-entrenched customs of international law. Any agreement that may exist on this score has failed to surface in the declarations and accords that commonly manifest the mutual concern of states. *See Filartiga I*, 630 F.2d at 888 ("It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute."). Because a human rights norm recognizing an individual's right to be free from transborder abductions has not reached a status of international accord sufficient to render it "obligatory" or "universal," it cannot qualify as an actionable norm under the ATCA. This is a case where aspiration has not yet ripened into obligation.[15]

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[15] The dissent asserts that we could shortcut our analysis and make ATCA review "easier" by determining, as a threshold matter, whether the United States, through the political branches, has decided variously not to "recognize," "assent," "agree with," or "subscribe to" an international norm prohibiting transborder arrests. Should the United States demonstrate any form of non-acquiescence, the customary international law norm would, according to the dissent, fail to achieve "universal" status for purposes of ATCA liability.

Although we accept the well-established principle that customary norms are fundamentally based on the consent of states, and that the United States might well decide to deliberately disavow or repudiate certain principles of international law, we cannot agree with the dissent's implication that every executive branch decision to breach an international norm translates into a more global repudiation of that norm or necessarily insulates the United States and its agents from civil tort liability. Our understanding accords with *Ker*, 119 U.S. at 444-45, 7 S. Ct. 225 (holding that civil

B. ARBITRARY ARREST AND DETENTION AND THE LAW OF NATIONS

Alvarez is not, however, without a remedy. The unilateral, nonconsensual extraterritorial arrest and detention of Alvarez were arbitrary and in violation of the law of nations under the ATCA.

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remedies might still be available for violations of treaties or the law of nations even though jurisdiction to prosecute a defendant criminally may not be invalidated by an extraterritorial abduction), and the Supreme Court's more recent acknowledgment that Alvarez might be correct that his abduction was "shocking" and "in violation of general international law principles," *Alvarez-Machain II*, 504 U.S. at 669, 112 S. Ct. 2188; *see also The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 44 L.Ed. 320 (1900) (stating that "[i]nternational law is part of our law," and that "where there is no treaty, and no *controlling* executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators . . . ."") (emphasis added); *Yousef*, 327 F.3d at 92 n.25 ("While it is not possible to claim that the practice or policies of any one country, including the United States, has any such authority that the contours of customary international law may be determined by reference only to that country, it is highly unlikely that a purported principle of customary international law in direct conflict with the recognized practices and customs of the United States and/or other prominent players in the community of States could be deemed to qualify as a *bona fide* customary international law principle.") (emphasis added); Louis Henkin, Foreign Affairs and the U.S. Constitution 243 (2d ed. 1996) (explaining that "[u]nlike treaties . . . principles of customary international law cannot be denounced or terminated by the President and cannot be eliminated from the law of the United States by *any* Presidential act.") (emphasis added).

1. THE PROHIBITION AGAINST ARBITRARY ARREST AND DETENTION

Unlike transborder arrests, there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention. This prohibition is codified in every major comprehensive human rights instrument and is reflected in at least 119 national constitutions. *See* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 260-61 (1993). The Universal Declaration, perhaps the most well-recognized explication of international human rights norms, provides that "[n]o one shall be subjected to arbitrary arrest, detention, or exile," Universal Declaration, art. 9, and the ICCPR, which the United States has ratified,[16] unequivocally obliges states parties to refrain from "arbitrary arrest or detention." ICCPR, art. 9.[17]

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[16] The ICCPR is one of several international covenants designed to formally codify many of the rights embodied in the Universal Declaration. *See* Brownlie, *supra*, at 576.

[17] Each of the regional human rights instruments contains a similar prohibition. *See* American Convention, art. 7(3) ("No one shall be subject to arbitrary arrest or imprisonment."); European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), art. 5(1), *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (deprivation of liberty must be "in accordance with a procedure prescribed by law" and only in the case of, *inter alia*, "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority . . . ."); African Charter on Human and Peoples' Rights ("African Charter"), art. 6, June 27, 1981, 21 I.L.M. 58 (1982) ("[N]o one may be arbitrarily arrested or detained.").

We recently reaffirmed the universal, obligatory, and specific nature of this norm in *Martinez*, 141 F.3d at 1384 (recognizing a "clear international prohibition against arbitrary arrest and detention"); *see also Marcos IV*, 103 F.3d at 795 (recognizing "arbitrary detention . . . as [an] actionable violation[ ] of international law"). We explained, in defining the norm, that "[d]etention is arbitrary 'if it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person.'" *Martinez*, 141 F.3d at 1384 (quoting Restatement on Foreign Relations § 702 cmt. h).[18]

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[18] Our standard reflects the language of the Restatement as well as other major international sources. *See* Restatement on Foreign Relations § 702 cmt. h; ICCPR, art. 9(1) ("No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."); *id.*, art. 9(5) ("Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."); European Convention, art. 5(1) (deprivation of liberty must be "in accordance with a procedure prescribed by law" and only in the case of, *inter alia*, "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority . . . ."); African Charter, art. 6 ("No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."); *see also Winterwerp* v. *Netherlands*, 33 Eur. Ct. H.R. (ser. A.) at para. 39 (1979) ("[N]o detention that is arbitrary can ever be regarded as lawful."); United Nations, *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention, and Exile* 7 (1964) ("United Nations Study") (adopting the view that "an arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with the respect for the right to liberty and security of person").

Sosa acknowledges the prohibition against arbitrary arrest and detention, but he contends that for ATCA liability to attach, Alvarez's detention must be "prolonged" in addition to being arbitrary. We can divine no such requirement in our precedent or in the applicable international authorities. Rather, as the language of the international instruments demonstrates, the norm is universally cited as one against "arbitrary" detention and does not include a temporal element. Other authorities reflect this understanding. *See, e.g.*, Bassiouni, *Human Rights in the Context of Criminal Justice*, *supra*, at 260; Paul Sieghart, *The International Law of Human Rights* 135-59 (1983); *see also United Nations Study*, *supra*, at 5-8 (defining elements of the norm without mention of a temporal component).[19]

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[19] This reading is also supported in the case law. *See, e.g., de Sanchez* v. *Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) (recognizing "the right not to be arbitrarily detained" as part of the law of nations); *Rodriguez-Fernandez* v. *Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) ("No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."); *Paul* v. *Avril*, 901 F. Supp. 330, 333-34, 335 (S.D. Fla. 1994) (concluding plaintiff suffered arbitrary detention although he was held for less than ten hours); *Forti* v. *Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987) ("There is case law finding sufficient consensus to evince a customary international human rights norm against arbitrary detention. The consensus is even clearer in the case of a state's *prolonged* arbitrary detention of its own citizens." (internal citations omitted)); *see also Litwa* v. *Poland*, App. No. 26629/95, 33 Eur. H.R. Rep. 53 (2000) (finding detention of six hours and thirty minutes constitutes violation under Article 5 of the European Convention); *Quinn* v. *France*, App. No. 18580/91, 21 Eur. H.R. Rep. 529 (1995) (finding claim of arbitrary detention under Article 5 of the European Convention where petitioner was detained for a period of eleven hours).

Although § 702 of the Restatement on Foreign Relations includes a reference to "prolonged arbitrary detention,"[20] neither the Restatement nor our cases import a separate temporal requirement for purposes of ATCA liability. Section 702 contains a short list of human rights norms that it deems sufficient to qualify as customary law violations. *See* Restatement on Foreign Relations § 702(a)-(g). But the comments to § 702 clarify that the list is non-exhaustive and that virtually all of the norms listed, including "prolonged arbitrary detention," belong among the elite set of *jus cogens* norms that are non-derogable. *Id.* cmts. a, n. Section 702 does not state that every arbitrary detention must be "prolonged" to qualify as a violation of the law of nations—which is all that is required under the ATCA—and in fact implies the opposite. *See id.* cmt. ("A single, brief, arbitrary detention by an official of a state party to one of the principal international agreements might violate that agreement."). Likewise, our holding in *Martinez*, which cited the Restatement, included the length of detention as but one factor among many in determining whether a violation of the law of nations had occurred. 141 F.3d at 1384.

This is not to say that the length of detention cannot be a factor in evaluating whether there was an actionable violation of international law. Indeed, an extended detention following an improper arrest would necessarily contribute to "arbitrariness." We simply hold, consistent with international law, that there is no

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[20] The Restatement provides that "[a] state violates international law if . . . it practices, encourages, or condones . . . prolonged arbitrary detention." Restatement on Foreign Relations § 702(e).

freestanding temporal requirement nor any magical time period that triggers the norm.

2. APPLICATION OF ARBITRARY ARREST AND DETENTION STANDARD TO ALVAREZ

The standard then is whether the arrest and detention were arbitrary, that is, "not pursuant to law."[21] *Martinez*, 141 F.3d at 1384. In the case before us, there was, quite simply, no basis in law for the unilateral extraterritorial arrest and related detention of Alvarez in Mexico.

The only instrument Sosa can point to as evidence that Alvarez's abduction was "pursuant to law" is an arrest warrant issued by the United States District Court for the Central District of California. But a federal arrest warrant, without more, hardly serves as a license to effectuate arrests worldwide. It is no accident that the warrant is directed to "The United States Marshal and any *Authorized* United States Officer" (emphasis added). The Federal Rules of Criminal Procedure in effect at the time of Alvarez's arrest provided that "[a] warrant may be executed . . . within the jurisdiction of the United States." Fed. R.

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[21] Although the norm against arbitrary arrest and detention may encompass both illegal and unjust acts, we need not decide here under what circumstances an "unjust" arrest or detention might qualify as "arbitrary." *See, e.g.*, Restatement of Foreign Relations § 702 n. 6 ("Detention is arbitrary if it is unlawful or unjust."); Laurent Marcoux, Jr., *Protection from Arbitrary Arrest and Detention Under International Law*, 5 B.C. Int'l Comp. & L. Rev. 345 (1982) (analyzing the language and drafting history of the Universal Declaration and ICCPR as evidence that the term "arbitrary" was chosen to encompass a broader standard than mere unlawfulness).

Crim. P. 4(d)(2).[22] The language could hardly be clearer—"within the jurisdiction of the United States" means exactly what it says.[23]

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[22] Rule 4(d)(2) was amended on December 1, 2002. The Rule, renumbered as 4(c)(2), now reads, "A warrant may be executed, or a summons served, within the jurisdiction of the United States *or anywhere else a federal statute authorizes an arrest*" (underscoring indicates amendment). The advisory committee notes clarify that the "new language . . . reflects the recent enactment of the Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 114 Stat. 2488) that permits arrests of certain military and Department of Defense personnel overseas. *See also* 14 U.S.C. § 89 (Coast Guard authority to effect arrests outside territorial limits of United States)." Fed. R. Crim. P. 4 advisory committee's note. The calibration of Rule 4 to statutes in which Congress has made explicit the territorial reach of the arrest power demonstrates not only the limited scope of a traditional arrest warrant, but Congress's own recognition that it must speak clearly when expanding the geographical scope of an agent's extraterritorial arrest authority.

[23] Alvarez, of course, was only one of many charged in connection with Camarena's murder. An indictment issued on January 30, 1985 charged twenty-two persons with crimes in connection with Camarena's murder. Seven were tried in federal court. Including Alvarez, three of the seven were brought "by means of covert forcible abduction from their homelands." *Caro-Quintero*, 745 F. Supp. at 602. Alvarez's abduction was unique in that it involved neither the cooperation of local police nor the consent of a foreign government. *See United States* v. *Verdugo-Urquidez*, 856 F.2d 1214, 1216 (9th Cir. 1988), *rev'd*, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990) (Camarena murder suspect arrested by local Mexican police after U.S. arrest warrant was issued and suspect was handed over to U.S. Marshals at the U.S.-Mexico border); *Matta-Ballesteros* v. *Henman*, 896 F.2d 255, 256 (7th Cir. 1990) (Camarena murder suspect arrested in Honduras by Honduran Special Troops accompanied by U.S. Marshals; suspect driven to U.S. Air Force Base and flown to U.S.). Others were arrested in the United States. *See United States* v. *Lopez-Alvarez*, 970 F.2d

Despite the clear limitation on the extraterritorial reach of the arrest warrant, Sosa would have us believe that Alvarez's arrest in Mexico was authorized under American law.[24] The United States takes the same position in its defense against Alvarez's false arrest claim, which we discuss in a later section but which is also relevant here. Both parties conclude that the federal officers (and, by implication, Sosa) were authorized by statute to make warrantless arrests outside the United States. Because the criminal statutes under which Alvarez was charged have extraterritorial application, the argument goes, Congress must have granted DEA agents broad authority to enforce those statutes beyond our borders.

The proper starting point is, of course, the applicable statutory scheme. We begin with a well-established canon of construction. "It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC* v. *Arabian Amer. Oil Co. ("Aramco")*, 499 U.S. 244, 248, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991) (quoting *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285, 69 S. Ct. 575, 93 L.Ed. 680 (1949)). "In applying this principle, 'we assume that Congress legislates against the back-

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583, 586 (9th Cir. 1992); *United States* v. *Felix-Gutierrez*, 940 F.2d 1200, 1203 (9th Cir. 1991).

[24] The district court emphasized that no warrant was issued by Mexican authorities and no Mexican official lawfully effectuated the arrest. Although the district court focused on this lack of local authority, our analysis centers on the DEA's authority under United States law. We do not hold that extraterritorial authority in this case rests on "the consent or assistance of the host country," despite the dissent's preoccupation with the subject in Section III.B. of its opinion.

drop of the presumption against extraterritoriality.'" *Smith* v. *United States*, 507 U.S. 197, 204, 113 S. Ct. 1178, 122 L. Ed. 2d 548 (1993) (quoting *Aramco*, 499 U.S. at 248, 111 S. Ct. 1227). "[T]he presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind." *Id.* at 204 n.5, 113 S. Ct. 1178. The canon also "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248, 111 S. Ct. 1227 (citing *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22, 83 S. Ct. 671, 9 L. Ed. 2d 547 (1963)).

The Supreme Court, in recognizing this principle, has carved out an exception for a narrow class of substantive criminal statutes. In *United States* v. *Bowman*, 260 U.S. 94, 43 S. Ct. 39, 67 L.Ed. 149 (1922), the Court reviewed a criminal fraud provision used to indict individuals who committed acts on a U.S. vessel outside of American territorial waters. The Court reiterated its presumption that, in most cases, if a substantive criminal provision is to be applied extraterritorially, "it is natural for Congress to say so in the statute." *Id.* at 98, 43 S. Ct. 39. But the Court found that "the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated." *Id.*

We have no doubt that the substantive criminal statutes under which Alvarez was charged apply to acts occurring outside the United States. Invoking the rules

of construction just described, we reasoned in *United States* v. *Vasquez-Velasco*, 15 F.3d 833, 839-41 (9th Cir. 1994), that 18 U.S.C. § 1959, the racketeering statute under which Alvarez was indicted, applied extraterritorially. Later, we applied the same principles to conclude that "Congress intended to apply statutes proscribing the kidnapping and murder of DEA agents extraterritorially." *Felix-Gutierrez*, 940 F.2d at 1204.

These cases reinforce the established proposition that certain criminal statutes are applicable to conduct occurring outside of the borders of the United States. It was precisely this principle of extraterritoriality that led the Supreme Court to conclude that Alvarez could be tried in the United States. *Alvarez II*, 504 U.S. at 657 & n.1, 112 S. Ct. 2188. And it is this same concept that is invoked in case after case to assert jurisdiction over defendants—whether United States or foreign nationals—for criminal conduct occurring outside of the United States. *See, e.g.*, *United States* v. *Neil*, 312 F.3d 419, 421-23 (9th Cir. 2002) (applying extraterritoriality principle to bring citizen of St. Vincent and the Grenadines to trial in U.S. for sexual assault on cruise ship in Mexican territorial waters after cruise ship landed in U.S.); *United States* v. *Hill*, 279 F.3d 731, 739-40 (9th Cir. 2002) (applying harboring statute extraterritorially to bring to trial wife of violator of Deadbeat Parents Punishment Act arrested in U.S.); *Chua Han Mow* v. *United States*, 730 F.2d 1308, 1311-12 (9th Cir. 1984) (applying drug importation and distribution statutes extraterritorially to prosecute Malaysian defendant extradited to U.S.); *Yousef*, 327 F.3d at 87-111, 2003 U.S. App. LEXIS 6437, at **29-45 (applying provisions of the Destruction of Aircraft Act extraterritorially to conduct of terrorists who, after being arrested by

Philippine and Malaysian police and later turned over to the FBI, were prosecuted for their participation in a conspiracy to bomb United States commercial airliners in Southeast Asia).[25]

This proposition is not, however, the same as the far-reaching principle advocated by Sosa and the government, namely that a statute with extraterritorial application automatically carries with it the authority for United States agents to detain and arrest suspects worldwide. Extraterritorial *application*, in other words, does not automatically give rise to extraterritorial *enforcement* authority. Such a leap is too facile. That Congress may have intended the reach of a criminal statute to extend beyond our borders does not mean that Congress also intended to give federal law enforcement officers unlimited authority to violate the territorial sovereignty of any foreign nation to enforce those laws, or to breach international law in doing so.

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[25] Congress has extended the United States' substantive criminal jurisdiction extraterritorially in a host of statutes, all of which state clearly their jurisdictional reach. *See, e.g.*, 18 U.S.C. § 1119 (murder of U.S. national in a foreign country); 18 U.S.C. § 2332b (foreign terrorist activity in the U.S.); 18 U.S.C. §§ 1512(h), 1513(d) (witness tampering); 18 U.S.C. § 175 (use of biological weapons); 18 U.S.C. §§ 351, 1751 (crimes committed against high government officials); 18 U.S.C. § 1956 (money laundering); 18 U.S.C. § 2339B (assistance to foreign terrorist organizations); 18 U.S.C. § 1203(b)(1) (implementing Hostage Convention); 50 U.S.C. § 424 (extraterritorial jurisdiction over crimes relating to disclosure of national security information); 18 U.S.C. § 32(b) (violence against individual aboard or destruction of any "civil aircraft registered in a country other than the United States while such aircraft is in flight" or in service).

Bowman does not countenance such an extension, and our cases have never so held.[26]

In *Bowman*, the Supreme Court focused on the nature of the criminal conduct as a guide to determining the territorial reach of criminal statutes, but balanced that concern against limitations imposed by international law. The Court stated that "[t]he necessary locus, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations." 260 U.S. at 97-98, 43 S. Ct. 39. The Court repeatedly made reference to "the locus of the offense[ ]" and "the locus of [the] crime . . . in a foreign country," not to extraterritorial enforcement powers of the United States authorities. *Id.* at 97, 99, 43 S. Ct. 39. The court also emphasized that, by extending the reach of the substantive criminal statutes at issue, it was not imposing upon the sovereignty of other states.[27] *Id.* at 102-03, 43 S. Ct. 39.

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[26] This basic distinction between the reach of the substantive criminal laws and the reach of law enforcement makes imminent sense in light of the myriad ways in which the United States regularly achieves lawful custody of persons located abroad. The options are many, ranging from purely formal means—such as extradition pursuant to a treaty or local statute, formal deportation, and revocation of passports—to purely diplomatic tactics, such as informal deportation and negotiation. *See Abbell, supra*, § 7-2, at 7-14—7-17.

[27] The Court noted that because three of the defendants charged were citizens of the United States and were found in New York, "it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime." *Bowman*, 260 U.S. at 102, 43 S. Ct. 39. The Court expressly reserved the question whether the United States

Similarly, when we interpreted the criminal statutes for which Alvarez was indicted extraterritorially, we did so only with regard to the location of the conduct at issue. And even then we did so cautiously to ensure that we did not unnecessarily impinge on the sovereignty of other states or ignore accepted principles of international law. *See Vasquez-Velasco*, 15 F.3d at 839-40; *Felix-Gutierrez*, 940 F.2d at 1205-06; *Chua Han Mow*, 730 F.2d at 1311-12.

Taking the extraterritorial application of the applicable criminal laws as a given, the question then becomes whether Congress has separately authorized the unilateral, extraterritorial *enforcement* of those provisions in a foreign country by agents of the United States. The United States insists that such authority can be found in a provision in the Controlled Substances Act, 21 U.S.C. § 878, which grants certain powers to DEA and other law enforcement personnel.[28]

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had jurisdiction over the fourth defendant, a citizen of Great Britain. *Id.* at 102-03, 43 S. Ct. 39.

[28] Section 878 of the Act provides:

> (a) Any officer or employee of the Drug Enforcement Administration or any State or local law enforcement officer designated by the Attorney General may—
>
> (1) carry firearms;
>
> (2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of the United States;
>
> (3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;

Subsection 878(a)(3) of that provision authorizes DEA agents to make warrantless arrests on probable cause for suspected felony violations. 21 U.S.C. § 878(a)(3). Although this subsection grants DEA agents felony arrest power, no language in the statute provides, or even suggests, that Congress intended that power to extend outside the borders of the United States. Given that the provision applies to DEA agents as well as "any State or local law enforcement officer designated by the Attorney General," it would in fact be anomalous to read subsection (3) as the statutory basis for a geographically limitless arrest power. Nor can such power be found in the catchall language of subsection (5), which states that DEA agents, as well as designated state and local officials, may "perform such other law enforcement duties as the Attorney General may designate." 21 U.S.C. § 878(a)(5). Again, nothing in the text of the statute remotely indicates that Congress sought to extend DEA arrest authority to any territory outside American borders.

Although legislative silence is not necessarily dispositive, these provisions must be construed against the backdrop of *Aramco's* presumption against extraterritoriality. Even the narrow *Bowman* exception offers no safe harbor.[29] Section 878(a) regulates executive

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(4) make seizures of property pursuant to the provisions of this subchapter; and

(5) perform such other law enforcement duties as the Attorney General may designate.

21 U.S.C. § 878(a).

[29] We observe that *Bowman's* exception may be limited not only by its own language, but also in its application. *Aramco* did not mention *Bowman* at any point in its discussion of the presumption against extraterritoriality. We have interpreted the Court's

authority, not criminal conduct. And this provision can hardly be classified as a "criminal statute[ ] which [is] . . . not logically dependent on [its] locality for the Government's jurisdiction." *Bowman*, 260 U.S. at 98, 43 S. Ct. 39. To hold otherwise would essentially swallow the presumption against extraterritoriality and grant, without express congressional authorization, worldwide law enforcement authority to United States officials (and to state and local officials upon designation by the Attorney General). Virtually a limitless number of statutes would have both extraterritorial reach and the prospect of extraterritorial enforcement. Surely such a result would all but eviscerate the longstanding principle that our laws generally apply only within our territorial borders.

Faced with congressional silence on the matter, the United States analogizes this case to *United States* v. *Chen*, 2 F.3d 330 (9th Cir. 1993). The issue in Chen was whether agents of the Immigration and Naturalization Service acted outside their statutory authority by conducting an undercover investigation into the smuggling of Chinese aliens into the United States from international waters. The operation involved planting

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silence as an indication that *Bowman* remains the law. *See Felix-Gutierrez*, 940 F.2d at 1205 n.3. The Second Circuit, however, has held that *Bowman* should, at best, be interpreted narrowly. *See Kollias* v. *D&G Marine Maint.*, 29 F.3d 67, 71 (2d Cir. 1994) ("At best . . . the holding in Bowman should be read narrowly so as not to conflict with these more recent pronouncements on extraterritoriality."). Although we have implicitly rejected this latter interpretation, *see, e.g.*, *United States* v. *Corey*, 232 F.3d 1166, 1170 (9th Cir. 2000), the Second Circuit's concerns underscore the fact that we should not cavalierly cast aside the presumption against extraterritoriality in the face of the Supreme Court's recent jurisprudence.

undercover agents on a chartered boat (the Corinthian) that rendezvoused with a Chinese ship some 320 miles off the coast of California. The agents watched and videotaped as the Chinese aliens boarded the Corinthian, keeping the aliens under surveillance during and after their entry into the United States. *Id.* at 332.

In evaluating whether the INS exceeded its statutory authority, we looked to 8 U.S.C. § 1103(a), the statute charging the Attorney General with enforcement of the Immigration and Nationality Act, and determined that Congress had given the Attorney General "extremely broad powers" to administer and enforce the immigration laws by directing the Attorney General to "perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter." *Chen*, 2 F.3d at 333 (citation and internal quotation marks omitted). We inferred from the broad language of § 1103(a) that "Congress intended to grant the Attorney General the corresponding power to enforce the immigration laws both within and without the borders of the United States." *Id.* We also pointed to § 1103(b), which specifically authorizes the Attorney General to delegate this broad authority to the Commissioner of the INS. Finally, we were careful to note that the Attorney General had in fact exercised this authority and had explicitly delegated her broad enforcement powers to the Commissioner under 8 C.F.R. § 2.1. *Id.* at 334. This chain of authority, we reasoned, provided "the legal basis for the INS and its agents to undertake offshore undercover investigations such as this one." *Id.*

But this case is not *Chen*. First, the INS operation in *Chen*, which consisted solely of observing and recording events, did not take place within the boundaries of

another sovereign, but rather in international waters. That operation—unlike the abduction of a foreign citizen from a friendly neighbor—did not trigger any allegations of a breach of a law of nations. In fact, *Chen* did not even address international law, as traditional sovereignty concerns were not at issue. This distinction is critical, for one of the bedrock principles embodied in the presumption against extraterritoriality is that we must "protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248, 111 S. Ct. 1227; *see also Kollias*, 29 F.3d at 70 (applying the same rationale). If *Chen's* expansion of INS authority to the high seas did not raise concerns about clashing with laws of another sovereign, the case before us most certainly presents that danger.

Second, the demonstrated chain of delegated authority on which *Chen* relied, extending from Congress to the Attorney General to the INS Commissioner to the INS agents, has not been shown to exist with respect to the DEA. Section 878(a)(3) does grant DEA agents broad authority to make warrantless arrests, and § 878(a)(5) does confer the authority to "perform such other law enforcement duties *as the Attorney General may designate.*" 21 U.S.C. § 878(a)(5) (emphasis added). But even if *Chen* were to direct us to infer extraterritoriality from this bare language—a proposition that we do not accept—there is no evidence in this record that the Attorney General has in fact authorized the DEA Administrator to perform whatever extra-

territorial enforcement powers the Attorney General may have—either generally or as to this abduction.[30]

The importance of obtaining specific authorization for extraterritorial law enforcement operations is brought into sharper relief by the fact that had the INS operation in *Chen* occurred within the boundaries of a foreign nation, rather than in international waters, the Attorney General (or the Commissioner, acting under delegated authority) would have been statutorily required to consult with the Secretary of State before deploying INS agents abroad. *See* 8 U.S.C. § 1103(a)(7) ("[A]fter consultation with the Secretary of State, [the Attorney General] may, whenever in his judgment such

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[30] No regulation concerning the DEA's authority is analogous to the Attorney General's delegation of authority to the INS Commissioner in 8 C.F.R. § 2.1. In any event, there is no evidence that anyone ranking higher than the DEA Deputy Administrator or the United States Attorney for the Central District of California explicitly approved the operation. In view of this delegation vacuum, perhaps it is no surprise that the Department of Justice now requires explicit advance approval for such operations:

> Due to the sensitivity of abducting defendants from a foreign country, prosecutors may not take steps to secure custody over persons outside the United States (by government agents or the use of private persons, like bounty hunters or private investigators) by means of *Alvarez-Machain* type renditions without advance approval by the Department of Justice. Prosecutors must notify the Office of International Affairs before they undertake any such operation. If a prosecutor anticipates the return of a defendant, with the cooperation of the sending State and by a means other than an *Alvarez-Machain* type rendition, and that the defendant may claim that his return was illegal, the prosecutor should consult with the OIA before such return.

Department of Justice, United States Attorneys' Manual, § 9-15.610.

action may be necessary to accomplish the purposes of this chapter, detail employees of the Service for duty in foreign countries."). Such a restriction on the Attorney General's extraterritorial enforcement power, even in an area as obviously international as immigration, is evidence that Congress did not contemplate giving field agents the authority to act unilaterally in deciding to cross the borders of a friendly nation and abduct one of its citizens over that nation's objection. If the Attorney General must consult with the Secretary of State before dispatching INS agents to foreign lands, then surely, absent explicit statutory authorization, the Deputy Administrator of the DEA is not free to take it upon himself to send agents across the border into Mexico or to hire Mexican bounty hunters to act as surrogates to abduct a suspect.

Chen thus stands for only the proposition that the INS possesses limited delegated authority to conduct an operation on the high seas. At no point did we hold or even suggest that Congress has given license to the executive branch to violate international law in the course of enforcing criminal statutes that have extra-territorial reach. And surely *Chen* does not support the proposition that Congress has *sub silencio* delegated to the executive branch the authority to unilaterally enter a friendly nation and abduct one of its citizens in violation of international law.

Reading a generally worded statute like 21 U.S.C. § 878(a)(5) as evidence that Congress has given the DEA carte blanche to effectuate arrests within any sovereign state would require us to make the untenable assumption that Congress, in drafting such a statute, turned a blind eye to the interests of equal sovereigns and the potential violations of international law that

would inevitably ensue.[31] This we cannot do. *See McCulloch*, 372 U.S. at 21, 83 S. Ct. 671 (1963) ("'[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains.'" (quoting *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 2 L.Ed. 208 (1804))).

We are not suggesting that Congress lacks the power to enact laws authorizing extraterritorial law enforcement powers. Nor do we question the powers of the political branches to override the principles of sovereignty in some circumstances, should the need arise. Rather, we are simply saying that we cannot impute such an intent where it is not expressed, and Congress has expressed no such intent here.[32]

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[31] Congress is well aware of the importance of respecting territorial sovereignty, and it has shown caution in expanding extraterritorial jurisdiction at the expense of this obligation. For instance, in passing the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, 22 U.S.C. § 4801 *et seq.*, Congress refused to adopt a provision authorizing "self-help" measures. *See Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearing on S.1373, S. 1429, and S. 1508, Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 63 (1985). Similarly, in passing the Anti-Drug Abuse Act of 1986, Congress required the Coast Guard to obtain foreign flag consent to board a foreign flag vessel on the high seas. Pub. L. No. 99-570, § 2015, 100 Stat. 3207, 3268 (repealed 1994).

[32] The dissent believes we should ignore well-established principles of statutory construction and give Congress the benefit of the doubt because we have recognized that "[d]elegation of foreign affairs authority is given . . . broader deference than in the domestic arena." *Freedom to Travel Campaign* v. *Newcomb*, 82 F.3d 1431, 1438 (9th Cir. 1996). But *Freedom to Travel* and the other non-delegation cases cited by the dissent are inapplicable here. We have no quarrel with the position that Congress, in giving the

Congress has shown that it is quite capable of making clear when arrest powers should have extraterritorial effect. *See Aramco*, 499 U.S. at 258, 111 S. Ct. 1227 ("Congress' awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute."). In defining the law enforcement powers of the Coast Guard, for example, Congress provided that "[t]he Coast Guard may make . . . arrests upon the high seas and waters over which the United States has jurisdiction." 14 U.S.C. § 89(a). The powers of customs officials on the high seas have likewise been clearly articulated. *See* 19 U.S.C. § 1701 (permitting customs officials to seize or arrest in those areas of the high seas designated as customs-enforcement areas by the President).

More recently, in the Military Extraterritorial Jurisdiction Act of 2000,[33] Congress included clear and separate provisions pertaining both to the extraterritorial scope of the substantive crime *and* the executive agency's power to arrest. Section 3261(a), relating to certain members and employees of the Armed Forces,

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Executive authority over matters of foreign affairs, may delegate authority through broad (albeit not limitless) directives. *See Zemel* v. *Rusk*, 381 U.S. 1, 17, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965). Rather, we are simply saying that there is no evidence in the applicable statutory scheme that Congress ever granted the DEA the power to conduct arrests abroad. Hence, we do not address whether 21 U.S.C. § 878 is an impermissible delegation of congressional power.

[33] This legislation was quickly enacted in response to the Second Circuit's decision in *United States* v. *Gatlin*, 216 F.3d 207 (2d Cir. 2000), which highlighted a gap in prosecutions of civilian personnel living abroad with the military.

addresses the extraterritorial scope of the substantive crime:

> Whoever *engages in conduct outside the United States* that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States . . . shall be punished as provided for that offense.

18 U.S.C. § 3261(a) (emphasis added). Section 3262(a), pertaining to "arrest and commitment," explicitly lays out the scope of arrest powers:

> The Secretary of Defense may designate and authorize any person serving in a law enforcement position in the Department of Defense *to arrest*, in accordance with applicable international agreements, *outside the United States* any person described in section 3261(a) [of the Act] if there is probable cause to believe that such person violated section 3261(a).

18 U.S.C. § 3262(a) (emphasis added).[34] If Congress thought it could rely on courts to supply extraterritorial

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[34] The government points to other statutes pertaining to the military's powers overseas, such as 10 U.S.C. § 374(b)(1)(D) and 18 U.S.C. § 351, arguing that these provisions "plainly envision foreign law enforcement activity." We agree. These statutes underscore the point that Congress is clear when it wishes to be. Section 374(b)(1)(D) allows the Secretary of Defense, upon the request of a federal law enforcement agency, to make defense personnel available "to operate equipment" with respect to "a rendition of a suspected terrorist from a foreign country to the United States to stand trial." Section 351 allows the FBI to request assistance from the military, as well as "any Federal, State, or local agency," in "investigat[ing]" kidnappings or assassinations of Congressional,

scope through searching interpretations of vague statutes, no such language would be necessary.

Wishful thinking is no substitute for clear congressional authority. Congress surely knows how and when to expand the reach of its laws beyond our borders. There is little doubt that Congress has the authority to do so; there is also little doubt that it has not done so here. Thus, although we recognize that the kidnapping and murder of DEA agents abroad necessitates the exercise of extraterritorial criminal jurisdiction, absent a clear directive, we cannot conclude that Congress has given the DEA unlimited enforcement powers abroad. Finding no basis in law for the DEA's actions, and left only with a warrant issued by a United States court, we conclude that Alvarez's arrest, and hence his detention, were arbitrary because they were not "pursuant to law." Consequently, Alvarez established a tort committed in violation of the law of nations.

II. ALIEN TORT CLAIMS ACT—SUBSTITUTION OF THE UNITED STATES FOR THE DEA AGENTS

We next consider whether the district court appropriately substituted the United States for the individual government defendants. The Federal Employ-

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Cabinet, and Supreme Court members. Not only do these statutes not speak to military arrest powers, but they define the universe (*e.g.*, operating equipment or assisting in investigation) in which Congress has chosen to involve the military in law enforcement overseas. Section 374(b)(1)(D) is one of a number of provisions, along with the Posse Comitatus Act, 18 U.S.C. § 1385, that actually limit military involvement in civilian law enforcement operations. In considering 10 U.S.C. §§ 371-80, we concluded that "these sections impose limits on the use of American armed forces abroad." *United States* v. *Khan*, 35 F.3d 426, 431 n.6 (9th Cir. 1994).

ees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act"), 28 U.S.C. § 2679, provides that, for civil actions arising out of the wrongful act of a federal employee acting within the scope of his official duties, the United States is to be substituted as a defendant and the claims may proceed only under the FTCA. 28 U.S.C. § 2679(b)(1). This exclusive remedy provision does not apply, however, in an action "which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(B). Alvarez argues that the ATCA falls within this exemption.

But we agree with the three-judge panel's conclusion that the exemption does not apply here, and that the United States was properly substituted for the individual DEA agents. *Alvarez-Machain IV*, 266 F.3d at 1053. Accordingly, we adopt the relevant portion of that opinion:

> The district court held that an action under the ATCA was not exempt from the exclusive remedy provision of the Liability Reform Act. It reasoned that "it is international law, not the ATCA," that gives individuals fundamental rights. Therefore, a claim under the ATCA is based on a violation of international law, not of the ATCA itself. This reading is consistent with the Supreme Court's reasoning in *United States* v. *Smith*, 499 U.S. 160, 111 S. Ct. 1180, 113 L. Ed. 2d 134 (1991). In *Smith*, the Court rejected the argument that a claim for medical malpractice was "authorized" by the Gonzalez Act and therefore fit the 28 U.S.C. § 2679(b)(2)(B) exception for violations of a statute. The court explained: "[n]othing in the Gonzalez Act imposes

any obligations or duties of care upon military physicians. Consequently, a physician allegedly committing malpractice under state or foreign law does not 'violate' the Gonzalez Act." *Smith*, 499 U.S. at 174, 111 S. Ct. 1180.[35] The same can be said of the ATCA. The language of § 1350 creates no obligations or duties. Admittedly, the ATCA differs from the Gonzalez Act in that it creates a cause of action for violations of international law, whereas the Gonzalez Act limited the common law liability of doctors. *See Marcos II*, 25 F.3d at 1475 (rejecting the argument that the ATCA is merely jurisdictional); *Abebe-Jira* v. *Negewo*, 72 F.3d 844, 848 (11th Cir. 1996); *Filartiga*, 630 F.2d at 885-86. Nonetheless, we find nothing in this distinction to cause us to deviate from the plain language of the statute. We therefore agree with the district court that Alvarez's claims under the ATCA were subject to substitution under the Liability Reform Act. Accordingly, Alvarez's exclusive remedy against the United States, in lieu of the DEA agents, is through the FTCA.

Id. at 1053-54.

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[35] The relevant provision of the Gonzalez Act provides:

> The remedy against the United States provided by [the FTCA] for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician . . . of the armed forces . . . while acting within the scope of his duties or employment . . . shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician . . . whose act or omission gave rise to such action or proceeding.

10 U.S.C. § 1089(a) (1994).

Because the United States is substituted for the DEA agents, we treat the claims brought against the agents within the context of the FTCA. *See* § IV *infra*.

III. ALIEN TORT CLAIMS ACT—DAMAGES

A. CHOICE OF LAW

In addressing the matter of damages related to Sosa's liability under the ATCA, we must first determine the applicable substantive law. We review de novo the district court's decision concerning the appropriate choice of law. *Abogados* v. *AT&T, Inc.*, 223 F.3d 932, 934 (9th Cir. 2000).

Two obvious choices present themselves in this cross-border dispute: the domestic law of the United States and that of Mexico. The district court chose to apply federal common law, rather than Mexican law, in fashioning a damages award for Sosa's ATCA violations. The court reasoned that Mexican law would "inhibit the appropriate enforcement of the applicable international law or conflict with the public policy of the United States." *Alvarez-Machain* v. *United States*, No. 93-4072, slip op. at 33 (Sept. 9, 1999) (quoting *Filartiga* v. *Pena-Irala ("Filartiga II")*, 577 F. Supp. 860, 864 (E.D.N.Y. 1984)).

The precise issue before us, the choice of law for damages under the ATCA, is one of first impression. In *Marcos III*, we construed the district court's award of exemplary damages as having embraced Philippine law and concluded that this was not an error because such damages were allowed under Philippine law. 103 F.3d at 779-80. Our holding in *Marcos III*, however, went no further. We did not review the district court's choice of law analysis or enumerate the circumstances in which foreign law would apply. *See id.* (noting that there was

"no ruling by the district court expressly choosing Philippine law").

The few courts that have addressed damages under the ATCA do not appear to have followed a consistent approach in determining the applicable law. Perhaps the most explicit treatment of the issue was offered by the district court in the *Filartiga* litigation. When faced with the question of damages on remand, the district court decided, in light of the ATCA's purpose, that federal choice of law principles should govern the initial determination of the remedy. *See Filartiga II*, 577 F. Supp. at 863. Applying these principles in the broadest of terms, the court noted that virtually all of the contacts took place in Paraguay, and thus Paraguayan law appeared to be appropriate for setting compensatory damages. *Id.* at 863-64. The court took a different tack, however, on punitive damages. Because Paraguay did not recognize punitive damages, which were deemed necessary "to give effect to the manifest objectives of the international prohibition against torture," the court turned to international law principles. *Id.* at 865.

Other courts awarding damages in the wake of *Filartiga II* have adopted a number of approaches. Most courts have not directly addressed the choice of law dilemma, while others have offered variations on the *Fiiartiga II* theme. *See, e.g., Tachiona* v. *Mugabe*, 234 F. Supp. 2d 401, 418-22 (S.D.N.Y. 2002) (addressing the choice of law issue, but abandoning a traditional choice of law analysis in favor of a more "flexible" approach for determining both substantive rights and remedies); *Mehinovic* v. *Vuckovic*, 198 F. Supp. 2d 1322, 1358-59 (N.D. Ga. 2002) (conducting no choice of law analysis but making repeated references to "inter-

national law" in awarding both compensatory and punitive damages); *Xuncax*, 886 F. Supp. at 183, 198 (using an analysis similar to that of *Tachiona*); *Avril*, 901 F. Supp. at 335 (citing *Filartiga II* for the position that both compensatory and punitive damages are available but providing no indication as to which law was applied).[36]

Mindful of this varied landscape, we begin our inquiry with a traditional choice of law analysis. As the Supreme Court has counseled, "[c]hoice of law is, of course, determined by the forum jurisdiction," *Zicherman*, 516 U.S. at 228-29, 116 S. Ct. 629, which in this case is federal court. Federal question jurisdiction was predicated on the ATCA and thus federal common law applies to the choice-of-law determination. *See Chan* v. *Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1297 (9th Cir. 1997) (holding that federal common law applies to choice-of-law determination in federal question case).[37]

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[36] It bears noting that most of the cases addressing damages under the ATCA have done so without the benefit of, or without reference to, *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 229, 116 S. Ct. 629, 133 L. Ed. 2d 596 (1996), in which the Supreme Court interpreted the damages provisions of the Warsaw Convention and concluded that it does not "empower us to develop some common-law rule—under cover of general admiralty law or otherwise—that will supersede the normal federal disposition." The Court held that the Convention "provide[d] nothing more than a pass-through, authorizing us to apply the law that would govern in the absence of the Warsaw Convention," which in that case was the Death on the High Seas Act, 46 U.S.C. App. § 761. *Zicherman*, 516 U.S. at 229, 116 S. Ct. 629.

[37] Although the Second Circuit observed in *Pescatore* v. *Pan American World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996), that "the law is unsettled when it comes to applying either a federal common law choice of law rule or state choice of law principles in non-diversity cases," we believe that both *Zicherman* and our

Under federal common law, we look to the Restatement (Second) of Conflict of Laws ("Restatement of Conflicts") for guidance. *Schoenberg* v. *Exportadora de Sal, S.A.*, 930 F.2d 777, 782 (9th Cir. 1991) (explaining, in the context of the Foreign Sovereign Immunities Act, that "[f]ederal common law follows the approach of the Restatement (Second) of Conflict of Laws"); *see also Bickel* v. *Korean Air Lines Co.*, 83 F.3d 127, 130 (6th Cir. 1996) (noting, in the context of the Warsaw Convention, that "[i]n the absence of any established body of federal choice of law rules, we begin with the Restatement (Second) of Conflict of Laws . . . .")

Section 145[38] of the Restatement, which delineates the general principles applicable to torts, states that the "rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6."[39] The

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precedent support the application of federal common law conflicts principles.

[38] Sosa urges us to look to § 146 of the Restatement which provides, with respect to personal injury actions, that there is a presumption in favor of applying "the local law of the state where the injury occurred," which in this case was Mexico. But the tort here—arbitrary arrest and detention as a recognized violation of international law—is not a classic personal injury claim. Nor does Alvarez's claim "involve either physical harm or mental disturbance . . . resulting from physical harm" as envisioned by § 146. Restatement of Conflicts § 146 cmt. b. Finally, the presumption is not absolute and other considerations weigh in favor of applying United States law.

[39] The factors in § 6 include:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

section continues by listing the following "contacts" that should "be taken into account in applying the principles of § 6 to determine" the state with the "most significant relationship":

> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.

Id. § 145(2).

These principles are meant to serve as a guide for consideration of competing policy choices. The factors, coupled with the contacts, are not necessarily of equal weight, nor do they lend themselves to a bean-counting exercise in which everything is lined up on a ledger and the answer emerges. Indeed, as noted in the comment, "[a]t least some of the factors . . . will point in differ-

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> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
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> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

Id. § 6(2).

ent directions in all but the simplest case." *Id.* § 6 cmt. c. This international dispute illustrates in practical terms the reality of that admonition. In a claim based on a universal, international standard, it may seem presumptuous to choose the law of one country over another. Admittedly, the needs of the international system are often too complex to dictate a clear choice, in part because our task is limited to a legal analysis and we leave foreign policy to the Executive branch and the diplomats. Nonetheless, we are driven to make a choice so that damages may be assessed in accord with the substantive law of a chosen jurisdiction.

Stepping back and looking at the overall picture, we view this case as a series of events that began and ended in the United States, and which are inextricably intertwined with the United States government. The United States' interests are particularly pointed here: the United States itself is a party, and it is the conduct of the United States government, in its efforts to bring a suspect to justice, that spawned the international incident. The genesis of the crucial events was a federal criminal prosecution of Alvarez in Los Angeles. DEA agents working in the United States devised a plan, which they hired Sosa to carry out, and without which the tort would not have occurred. Sosa acted according to DEA instructions when he helped detain Alvarez and transport him to the United States for trial. Sosa himself had no justifiable expectation that Mexican law would apply, particularly because he was employed as an agent of the American government, and because this is a tort, rather than a contract, case. The relationship between Sosa and Alvarez was intimately connected with, and a direct product of, the interests of the United States government. Just as importantly,

the tort is predicated on an arrest and detention that were arbitrary because the agents exceeded the scope of their authority under United States law.

As Sosa points out, some of the Restatement factors weigh in favor of applying Mexican law. Alvarez's actual arrest occurred in Mexico. Both Alvarez and Sosa were Mexican citizens and residents at the time of the events in question (although Sosa later moved to the United States). As a result, Mexico may in fact have competing interests—seeking to obtain compensation for its citizen, Alvarez, while limiting damages from Sosa, another of its citizens.

Nonetheless, we must also take into account the policy of the United States, as expressed in the ATCA, to provide a remedy for violations of the law of nations. *See Marcos II*, 25 F.3d at 1475. We agree with the district court that limitations on damages under Mexican law—including the unavailability of punitive damages—are not consistent with the congressional policy that underlies the ATCA.

After weighing these factors, we conclude that the relative importance of United States contacts and interests counsels in favor of applying United States law. Our ruling today does not foreclose the application of foreign law in another circumstance; it is simply the appropriate outcome given the factors and policies present in this suit.

Our choice of law conclusion brings us to another level of inquiry: In applying United States law, should we apply federal common law or the law of California? We are aware of the Supreme Court's view that we should not reach out to extend federal common law. *See O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 83-84, 114 S.

Ct. 2048, 129 L. Ed. 2d 67 (1994); *see also Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991) (explaining the presumption in favor of incorporating state law to provide the content of federal common law, and that "a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards . . . or when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand. . . . .").

On the other hand, because the ATCA invokes international law principles of universal concern, it holds a unique place among federal statutory tort causes of action, and application of federal common law is therefore appropriate.[40] *See Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981) (observing that, in "international disputes implicating . . . relations with foreign nations . . . our federal system does not permit the controversy to be resolved under state law" because the "international nature of the controversy makes it inappropriate for state law to control"); *see also Sabbatino*, 376 U.S. 398, 427 n.25, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964) (noting that the ATCA is an example of a statute reflecting a "concern for uniformity in this country's dealings with foreign nations").

B. SCOPE OF DAMAGES

The district court determined that Alvarez could recover damages only for activities taking place prior to

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[40] Although we apply federal common law, we note that, as discussed below, the result would be the same under state law.

the point that United States law enforcement authorities took him into custody, not for the entire period in which he was imprisoned in the United States. We review this question of law de novo. *See United States* v. *Stephens*, 237 F.3d 1031, 1033 (9th Cir. 2001).

There is no established body of case law applying federal common law to determine the proper scope of damages for arbitrary arrest and detention. Although several federal cases have awarded damages for this brand of international law violation, none of those cases dealt with the unique set of facts presented here. *See, e.g.*, *Xuncax*, 886 F. Supp. at 197-98 (awarding damages for arbitrary detention authorized by Guatemala's Minister of Defense). Even so, we agree with the district court that existing principles governing false arrest provide adequate guidance.

In the context of law enforcement, the federal courts are largely in accord that, consistent with the principles of tort law, the chain of causation set in motion by the initial act of misconduct of one actor can be broken by the acts of a third party. For example, police officers have been held to be insulated from liability for deprivations of liberty where there are independent, intervening acts of other decision-makers in the criminal justice system, such as prosecutors, grand juries, or judges. *See Heck* v. *Humphrey*, 512 U.S. 477, 484, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) (" 'If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process or arraignment, but not more.'" (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser & Keeton on the Law of Torts* 888 (5th ed. 1984))); *Townes* v. *City of New York*, 176 F.3d 138, 147 (2d Cir. 1999) (holding that the trial judge's independent decision not to suppress evidence,

though erroneous, broke the chain of causation for purposes of police officer's liability); *Barts* v. *Joyner*, 865 F.2d 1187, 1195 (11th Cir. 1989) (holding that intervening acts of prosecutor, grand jury, and judge broke chain of causation); *Hand* v. *Gary*, 838 F.2d 1420, 1427-28 (5th Cir. 1988) (holding that a sheriff's actions were not the proximate cause of damages given intervening acts of federal agents, federal prosecutors, and grand jury). In this connection, we have held that the "[f]iling of a criminal complaint immunizes investigating officers . . . from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time." *Smiddy* v. *Varney*, 665 F.2d 261, 266 (9th Cir. 1981).[41]

These principles of proximate causation, taken in combination with the Supreme Court's holding in *Alvarez-Machain II*, guide us in assessing the scope of Sosa's liability. Sosa's participation in Alvarez's arrest and detention in this case took place almost solely within the confines of Mexico. Although he was guided by the unlawful directives of American DEA agents, once he delivered Alvarez to United States authorities in El Paso, the actions of domestic law enforcement set in motion a supervening prosecutorial mechanism which met all of the procedural requisites of federal due process and ultimately received the blessing of the

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[41] Our holding in *Smiddy* was limited. We concluded that the presumption that the prosecutor exercised independent judgment can be rebutted by, for instance, "a showing that the [prosecutor] was pressured or caused by the investigating officers to act contrary to his independent judgment," or by "the presentation by the officers to the [prosecutor] of information known by them to be false." 665 F.2d at 266-67.

United States Supreme Court. *See Alvarez-Machain II*, 504 U.S. at 669-70, 112 S. Ct. 2188. To be sure, a grand jury had already indicted Alvarez and an American arrest warrant had been issued by the time Sosa was hired, giving this case a unique factual twist when compared to traditional false arrest cases. But, as we have explained, these procedural formalities stand apart from the illegitimacy that characterized Alvarez's initial arrest and detention, and came into operation only at the moment Alvarez set foot on U.S. soil. At that point, the criminal justice system, with proper jurisdiction, began its march toward trial and the chain of causation linked to Sosa's actions was broken, thus limiting Sosa's liability for damages. Because the district court cited California law for its damages analysis, the parties focus on the nuances of California law, despite framing the issue in terms of choosing either federal common law or Mexican law. Applying California law, however, yields the same result. The California Supreme Court recently rejected a plaintiff's claim of false imprisonment for the entire time he was held in custody. *See Asgari* v. *City of Los Angeles*, 15 Cal. 4th 744, 63 Cal. Rptr. 2d 842, 937 P.2d 273, 281 (1997). Relying on state statutes, the court explicitly distinguished the rebuttable presumption rule of *Smiddy*, clarifying that a police officer's liability for false arrest could not, even with a showing of bad faith, include damages caused by incarceration following arraignment because that result would thwart the applicable statutes' directives. *Id.* at 279.

Alvarez seeks to distinguish *Asgari* by arguing that it is a narrow holding based only on immunity principles grounded in the California Tort Claims Act, specifically Cal. Gov. Code §§ 820.4 and 821.6. Instead, he urges us

to rely on an earlier case, *Gill* v. *Epstein*, 62 Cal. 2d 611, 44 Cal. Rptr. 45, 401 P.2d 397 (1965), which held, prior to the enactment of the above provisions, that a plaintiff could recover damages arising from his incarceration after his arraignment because the arraignment was not an independent act that could break the chain of causation. *Id.* at 401. But *Gill* does not help Alvarez. In *Gill*, the plaintiff was arrested without a warrant, and the case was dismissed at a preliminary hearing five days after the arraignment. *Id.* at 398-99. The court held that the plaintiff could recover for damages up until the time an independent judgment was made as to probable cause for his arrest. *See id.* at 401. Here, there is no question that at the time Alvarez was arrested, an independent judgment had already been made that he should be brought to trial.[42] As a result, Alvarez is entitled to damages only to the point at which he was handed over to U.S. authorities.

IV. FEDERAL TORT CLAIMS ACT

The FTCA acts as a limited waiver of the sovereign immunity of the United States for certain torts committed by its employees. 28 U.S.C. §§ 1346(b), 2674. The statute provides that the United States shall be "liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28

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[42] Although we decline to speak for the California Supreme Court as to the status of *Gill* after *Asgari*, we note also that in *Asgari* the court looked not only to statutory immunity principles but also to the broader proximate cause principles articulated in New York's *Broughton* rule, which measures liability only up to the time of arraignment or indictment, whichever comes first. *See Asgari*, 63 Cal. Rptr. 2d 842, 937 P.2d at 281 n.10 (citing *Broughton* v. *State*, 37 N.Y.2d 451, 373 N.Y.S.2d 87, 335 N.E.2d 310, 316 (1975)).

U.S.C. § 2674. At issue here is whether Alvarez's claims fit within the FTCA's waiver provision or instead fall specifically within any of the statutory exclusions to FTCA jurisdiction—in particular, the "foreign activities" exception or the "intentional tort" exception.

The United States argues that Alvarez's kidnapping lies outside the jurisdiction of the FTCA. But we agree with the district court that neither exception applies.

A. "FOREIGN ACTIVITIES" EXCEPTION

The foreign activities exception bars recovery for "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). Its purpose is "to ensure that the United States is not exposed to excessive liability under the laws of a foreign country over which it has no control." *Nurse* v. *United States*, 226 F.3d 996, 1003 (9th Cir. 2000). The district court held that many of Alvarez's claims, such as assault and the resulting infliction of emotional distress, derived from acts that took place entirely in Mexico and so were excluded under the ATCA. Alvarez does not appeal that decision.

But the district court permitted other claims—false arrest, false imprisonment, and the resulting infliction of emotional distress—to go forward under the "headquarters doctrine." Because "[t]he entire scheme of the FTCA focuses on the place where the negligent or wrongful act or omission of the government employee occurred," *Sami* v. *United States*, 617 F.2d 755, 761 (D.C. Cir. 1979), a claim can still proceed under the headquarters doctrine if harm occurring in a foreign country was proximately caused by acts in the United States. *See Nurse*, 226 F.3d at 1003; *see also Cominotto* v. *United States*, 802 F.2d 1127, 1130 (9th Cir. 1986) (holding that an FTCA claim arises where an act or

omission occurs and "not necessarily at the site of the injury or the place where the negligence has its operative effect" (internal quotation marks omitted)).

The quintessential headquarters claim involves federal employees working from offices in the United States to guide and supervise actions in other countries. *See Nurse*, 226 F.3d at 1003 (applying the doctrine to FTCA claims made by a Canadian detained in Vancouver, British Columbia, against the U.S.-based Customs officials who trained the Vancouver agents); *Couzado* v. *United States*, 105 F.3d 1389, 1395-96 (11th Cir. 1997) (applying the doctrine to claims against DEA agents in the United States who coordinated an arrest in Honduras); *Sami*, 617 F.2d at 761-63 (applying the doctrine to claims against the Chief of the United States National Central Bureau in Washington, D.C., who sent messages causing an improper arrest in Germany). In evaluating whether the headquarters doctrine applies, we look to the law of the state where the alleged act occurred—in this case, California. *See* 28 U.S.C. § 1346(b)(1); *Couzado*, 105 F.3d at 1395 (applying Florida law to determine whether the doctrine applies to alleged negligence by DEA officials who were based in Florida and caused harm in Honduras).

Alvarez's abduction fits the headquarters doctrine like a glove. Working out of DEA offices in Los Angeles, Berellez and his superiors made the decision to kidnap Alvarez and, through Garate, gave Barragan precise instructions on whom to recruit, how to seize Alvarez, and how he should be treated during the trip to the United States. DEA officials in Washington, D.C., approved the details of the operation. After Alvarez was abducted according to plan, DEA agents supervised his transportation into the United States,

telling the arrest team where to land the plane and obtaining clearance in El Paso for landing. The United States, and California in particular, served as command central for the operation carried out in Mexico.

By contrast, we see little resemblance to the facts of *Cominotto*, in which we rejected the DEA informant's headquarters claim because he had disobeyed Secret Service orders by jumping into the suspects' car late one night in Bangkok. 802 F.2d at 1130. Alvarez did little but serve as an unsuspecting target of an operation planned in the United States. Under California law, negligent or criminal acts carried out by Alvarez's abductors in furtherance of the objectives given to them by American DEA agents "do not break the causal link between" the conduct of the DEA agents and Alvarez's injuries. *Vickers* v. *United States*, 228 F.3d 944, 956 (9th Cir. 2000). The arrest team's seizure of Alvarez was not the interruption, but the fulfillment, of the DEA agents' tortious acts. The events for which Alvarez seeks relief occurred precisely as the DEA intended.

The United States offers little to support its alternative argument that, even if applicable, the headquarters doctrine does not apply to intentional torts. We see no valid reason to distinguish between negligence and intentional torts when the purpose of the doctrine is to hold the federal government responsible where the plaintiff's injuries are proximately caused by conduct in the United States. *Sami*, 617 F.2d at 762 (noting that examination of the legislative history shows that the foreign activities exception "does not apply if the *wrongful acts or omissions* complained of occur in the United States" (emphasis added)). We hold that the headquarters doctrine applies to both negli-

gence and intentional torts. Alvarez's kidnapping claim therefore does not fall within the foreign activities exception.

B. "INTENTIONAL TORT" EXCEPTION

We also agree with the district court that Alvarez's claims do not fall within the "intentional tort" exception to the FTCA. *See* 28 U.S.C. § 2680(h).[43] Although the waiver of sovereign immunity under the FTCA excludes intentional torts such as false arrest, this exclusion is followed by an important proviso: It does not apply if the intentional tort is committed by an "investigative or law enforcement officer." *Id. See also Orsay* v. *United States Dep't of Justice*, 289 F.3d 1125, 1134 (9th Cir. 2002) (noting that Congress chose "to single out investigative and law enforcement officers from other federal employees" because their "authority to use force and threaten government action carries with it the risk of abuse, or the risk of intentionally tortious conduct").

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[43] The Act provides an exception for

> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

The DEA agents who orchestrated Alvarez's arrest are law enforcement officers as defined by the FTCA because they are "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h). Because the primary tortious act was the initiation and planning of Alvarez's abduction by the DEA agents, his claim falls squarely within this law enforcement proviso, and thus the intentional tort exclusion does not apply.

The purpose of the law enforcement proviso in § 2680(h) is to "provid[e] a remedy against the Federal Government for innocent victims of Federal law enforcement abuses." *Orsay*, 289 F.3d at 1134-35 (quoting S. Rep. No. 93-588, 93d Cong., 2d Sess. 3 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 2789, 2792 (1974)). As the original three-judge panel put it, this purpose would be manifestly frustrated if law enforcement officers could avoid liability by recruiting civilians "to do their dirty work." *Alvarez-Machain IV*, 266 F.3d at 1056.

Because neither the "foreign activities" exception nor the "intentional tort" exception applies, we proceed to the merits of Alvarez's false arrest claim under the FTCA.

C. FALSE ARREST CLAIM

The parties agree that if no exception applies, California law determines whether and to what extent the United States is liable. *See* 28 U.S.C. § 1346(b)(1). Because "[u]nder California law, a California court would apply federal law to determine whether an arrest by a federal officer was legally justified and hence privileged," the United States' liability hinges on whether federal employees "complied with applicable federal

standards" in seizing Alvarez. *Rhoden* v. *United States*, 55 F.3d 428, 431 (9th Cir. 1995) (per curiam). The government argues that there is no California false arrest because federal law authorized Alvarez's apprehension in Mexico. Our earlier discussion of liability under the ATCA applies with equal force to our analysis of the FTCA claims against the United States. The DEA agents had no authority under federal law to execute an extraterritorial arrest of a suspect indicted in federal court in Los Angeles. *See supra* at § I.B.2.

Notwithstanding the fact that California law looks to federal law to determine the lawfulness of an arrest by federal officers, the district court concluded that Alvarez's abduction could still be justified as a citizen arrest under California law. The United States urges us to reach the same conclusion, arguing that, in certain situations, California's citizen arrest provision authorizes federal agents to make arrests even where federal authority is lacking.[44] *See United States* v. *DeCatur*, 430 F.2d 365, 367 (9th Cir. 1970) (noting that the arrest of the plaintiff by federal postal agents would have been justified under California Penal Code § 837, even if the agents lacked authority under a federal statute); *People* v. *Crusilla*, 77 Cal. App. 4th 141, 91 Cal. Rptr. 2d 415, 421 (1999) (holding that a federal immigration inspector's arrest of defendant was authorized as a citizen arrest).

Reliance on the California law of citizen arrest is misplaced in this context. Although the FTCA holds the United States liable in the same way that a private

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[44] California Penal Code § 837 permits a private citizen to arrest a person "[w]hen a felony has been in fact committed, and he has a reasonable cause for believing the person arrested to have committed it."

person would be liable "under like circumstances," 28 U.S.C. § 2674, the law enforcement obligations and privileges of the DEA agents "make the law of citizen arrests an inappropriate instrument for determining FTCA liability." *Arnsberg* v. *United States*, 757 F.2d 971, 979 (9th Cir. 1985); *see also* 21 U.S.C. § 878(a)(2); *Ting* v. *United States*, 927 F.2d 1504, 1514 (9th Cir. 1991) (citing *Arnsberg*). In *Arnsberg*, we declined to require Internal Revenue Service agents, who arrested the plaintiff with a defective warrant, to meet the stricter standard for citizen arrests under Oregon law. 757 F.2d at 978-79. Instead, we concluded, "[t]he proper source for determining the government's liability" is "the law governing arrests pursuant to warrants." *Id.* at 979. Applying that law, we determined that the agents acted properly. *Id.*

The principle adopted in *Arnsberg* works both ways: just as the law of citizen arrest cannot be used to limit the authority of law enforcement officers, nor can it be used to extend that authority, by proxy, beyond its territorial limits.[45] The DEA agents, not the Mexican nationals, identified Alvarez and planned the operation in detail; Alvarez's abductors acted merely as pawns.

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[45] The district court noted that Cal. Penal Code § 837 probably permits non-Californians to make a citizen arrest in California. California courts have applied this provision to police officers who make arrests outside of their jurisdiction but within California. *See, e.g., People* v. *Monson*, 28 Cal. App. 3d 935, 105 Cal. Rptr. 92, 95 (1972). California law also permits Mexican police crossing the border in fresh pursuit of a suspect to make an arrest in California, provided that the official brings the prisoner before a magistrate in the county where the arrest occurred. *See* Cal. Penal Code § 852.2. However, these provisions do not authorize a planned, transborder abduction of an alien by either law enforcement authorities or private citizens.

In this situation, the law of citizen arrest simply does not apply.

Although, as in *Arnsberg*, we apply the law governing arrests pursuant to warrants, we see a world of difference between the acts of the law enforcement officers in *Arnsberg* and the DEA agents who planned Alvarez's abduction. In *Arnsberg*, the IRS officials acted "nearly perfectly," consulting with the United States Attorney and arresting the plaintiff pursuant to a warrant with only a minor discrepancy. *Arnsberg*, 757 F.2d at 979. In contrast, as we have discussed, the DEA agents here had no authority, statutory or otherwise, to effect an extraterritorial arrest. Nor did their minions across the border, who could no more claim a lawful privilege to arrest Alvarez than could the DEA agents themselves under the same circumstances. The district court that issued Alvarez's arrest warrant had no jurisdiction to issue a warrant for an arrest in Mexico. *See* Fed. R. Crim. P. 4(c)(2). Accordingly, the DEA agents authorized a false arrest against Alvarez. We reverse the district court's dismissal of the FTCA claims and remand for further proceedings.

CONCLUSION

In summary, we affirm the judgment with respect to Sosa's liability under the ATCA, albeit on different grounds than the district court. We also affirm the substitution of the United States for the DEA agents, the choice of United States rather than Mexican law to determine damages, and the limitation of damages to Alvarez's time in captivity in Mexico. We reverse and remand the district court's dismissal of the FTCA claims against the United States. We approve the dismissal of Garate. Each party shall bear its own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FISHER, Circuit Judge, with whom Chief Judge SCHROEDER and Circuit Judges GOODWIN, THOMAS, and PAEZ join, concurring:

I fully concur in the majority opinion, but write separately to articulate another ground on which I base my conclusion that Alvarez's arrest and detention were arbitrary because they were conducted without lawful authority. As the majority opinion explains, whatever power the political branches might have to override the principle of territorial sovereignty, Congress has not expressed its intent to delegate that power to the Drug Enforcement Agency. I would add, moreover, that to the extent the Executive branch has the power to act without congressional sanction, there has been no showing that that power was properly invoked here.

It may well be, as the majority and the dissenting opinions assume, that the Executive—like Congress—has the authority to breach another nation's sovereignty and override other norms of international law, should the need arise. It is evident, however, that neither Congress nor the Executive has expressed an intent to allow sub-Cabinet-level law enforcement officials in the DEA to be the final arbiters of that authority. The President, the Attorney General, the Secretary of State, perhaps the Secretary of Defense, the National Security Advisor—these are the proper Executive branch officials with whom to entrust the weighty decision to kidnap and arrest a suspect on friendly foreign soil. As Judge Gould acknowledges in his dissent, "the capture of a foreign national on foreign

soil is no ordinary law enforcement choice; rather, it is a serious foreign policy decision," as evidenced by the international outcry that occurred in the wake of Alvarez's abduction. Such a decision, involving political judgments and national risks of the highest order, is—with all due respect to those involved—well above the paygrade of those who approved the abduction of Alvarez here.

DEA Agent Hector Berrellez made the offer to pay Mexican nationals to apprehend Alvarez in Mexico and deliver him to the United States. Berrellez received authorization to make this offer from his superiors in the Los Angeles office of the DEA and from DEA Deputy Administrator Pete Gruden in Washington, D.C. There is no evidence that anyone ranking higher than the DEA Deputy Administrator or the United States Attorney for the Central District of California explicitly approved the operation.[1]

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[1] There are some indications that individuals in the Attorney General's office were informed of the plan. At an evidentiary hearing before the district court on Alvarez's motion to dismiss the indictment in his criminal case, Berrellez testified that he believed that the Attorney General's office had been "consulted" about the operation. *See United States* v. *Caro-Quintero*, 745 F. Supp. 599, 603 (C.D. Cal. 1990). Berrellez did not, however, explain the basis for this belief; nor did he claim that the Attorney General's office gave its approval for the operation upon consulting with the DEA.

The only other evidence suggesting that the Attorney General's office might have been informed of the operation is an anonymous memorandum entitled "Operation Leyenda: Chronology" that the United States produced during discovery. According to the memorandum, whose origin is unclear, the United States Attorney's Office in Los Angeles approved the kidnapping plan, the DEA Administrator was "advised of the general plan, and he in turn advise[d] the Executive Assistant to the Attorney General." How-

It seems obvious that such a controversial, risky operation should have been evaluated and approved by the Attorney General personally (or at least by some high-ranking Department of Justice official authorized to act on the Attorney General's behalf), probably in consultation with the Department of State or the White House Counsel's office. Indeed, Judge Gould's dissent is predicated on the notion that "extraordinary renditions" of suspects from foreign nations are such critical foreign policy decisions that they must be planned and coordinated at the highest levels of government. He would rob this notion of any force, however, by equating the DEA actors here with the upper echelon of the Executive branch.

The *Chen* case illustrates that the decision to engage in extraterritorial operations is beyond the discretion of law enforcement officers. In stark contrast to the abduction of Alvarez, the limited INS operation at issue in *Chen*—as the *Chen* opinion took pains to delineate—was carefully planned and subjected to high-level review and approval at various levels within the Department of Justice:

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ever, DEA Administrator John C. Lawn testified at his deposition that he had no advance knowledge of the plan to use Mexican nationals to apprehend Alvarez, and the United States denied Alvarez's request for admission that Lawn approved the operation. The assertions contained in Berrellez's testimony and in the memorandum are therefore unsupported by the evidence. Even if we were to accept the assertions as true, however, they indicate nothing more than that the Attorney General's office had knowledge of the operation. They do not support the further conclusion that the Attorney General explicitly sanctioned Alvarez's extraterritorial abduction.

> On August 21, 1991, the Undercover Operations Review Committee of the United States Department of Justice (Review Committee) authorized the INS agents to proceed with the proposed undercover operation involving the use of the Corinthian in international waters.
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> . . . .
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> On August 27, the Review Committee considered a revised plan for the INS's proposed undercover operation. . . . The Review Committee was aware that INS agents would conduct the undercover investigation in international waters when approval was given. The Review Committee guidelines specifically contemplate an INS "undercover operation [that] will be conducted substantially outside the United States." INS Undercover Operation Guidelines at IV.A.(2). The operation was also approved by the United States Attorney for the Central District of California and an Assistant Attorney General in the Department of Justice, both of whom knew that the operation would be conducted in international waters.

Chen, 2 F.3d at 332. As we were careful to point out, the INS agents did not act on their own discretion but instead sought approval from numerous Department of Justice officials, "all of whom answer directly to the Attorney General herself." *Id.* at 334.

The logic of the conclusion that federal law enforcement officers must obtain Cabinet-level authorization for making extraterritorial arrests finds persuasive expression, in fact, in a legal opinion issued by the Department of Justice's own Office of Legal Counsel ("OLC"), legal advisor to the Attorney General and to

the Executive branch generally. In 1989, Assistant Attorney General William P. Barr addressed the very questions we confront here, but in the context of the FBI's authority "to investigate and arrest individuals for violating United States law, even if the FBI's actions contravene customary international law." 13 U.S. Op. Off. Legal Counsel 163 (1989) ("Barr Opinion"). The Barr Opinion contended—contrary to a previous 1980 OLC Opinion—that the FBI had such authority, either statutorily or at least through the Attorney General. Whatever weight the Barr Opinion merits, it did not endorse the FBI's ability to act on its own authority, but rather cautioned that the FBI may violate international law only "at the direction of the President or the Attorney General." *Id.* at 183. Indeed, the Opinion was even more explicit, and cautionary, in its advice regarding the extent and exercise of authority "to override customary international law" in, for example, forcibly abducting a suspect from another country without that country's consent. *Id.* at 180-81. The Barr Opinion advised in a prescient passage that:

> [W]e believe that the Attorney General has the power to authorize departures from customary or other international law in the course of law enforcement activities and that the President need not personally approve such actions. *We would not recommend, however, that the Attorney General delegate the authority to more subordinate officials.* Even if he is viewed as exercising statutory authority . . . we think that as a prudential matter the Attorney General should, in this case, exercise it personally. Decisions such as *Garcia-Mir* [v. *Meese*, 788 F.2d 1446 (11th Cir. 1986)] rely on the theory that the Executive has the constitutional authority

to make political decisions affecting our international relations. To the extent that such decisions are made by officials below cabinet rank, however, the factual basis for this theory may be weaker.

> *Specifically, we recommend that any overseas law enforcement activity that presents a significant possibility of departing from customary or other international law be approved directly by the President or the Attorney General.*

Id. at 180 (emphasis added).

Judge O'Scannlain's dissent therefore misses the mark by repeatedly stating that Congress has delegated to the Attorney General the authority to determine whether to enforce our laws extraterritorially. Even if such a delegation has in fact occurred—which has not been demonstrated here—it would be of little import in this case, because there is no evidence that the Attorney General played a role in the decision to abduct Alvarez.

Given the absence of specific approval by the Attorney General or any other Cabinet-level official, Judge O'Scannlain argues that the DEA enjoys the more general statutory authority to make extraterritorial arrests on its own accord. In support of this contention, he relies on *Chen*, claiming that the DEA's authority to act extraterritorially is the same as that of the INS. The critical distinction, however, is that the Attorney General has explicitly delegated to the INS his broad powers to enforce the immigration laws.[2] *See* 8 C.F.R.

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[2] Moreover, as I explained earlier, the INS agents who planned the operation in *Chen* sought high-level approval from the Department of Justice despite this general delegation of the Attorney General's authority.

§ 2.1. In the case of the DEA, the Attorney General has made no such delegation.

Judge O'Scannlain's dissent urges that this lack of an explicit delegation does not matter because Congress has authorized the extraterritorial *application* of the criminal statutes for which Alvarez was charged, and this authorization "would seemingly sanction" the extraterritorial *enforcement* of those statutes. The extraterritorial application and the extraterritorial enforcement of criminal statutes are far from synonymous concepts, however. That Congress may have intended a criminal statute to reach conduct that occurs beyond our borders, and that United States courts would have jurisdiction over such crimes, does not mean that Congress also intended to give law enforcement officers unlimited authority to enforce the statute by entering a foreign nation, uninvited, to abduct a foreign national, in violation of international law. Indeed, that is why we enter into extradition treaties. It is therefore not enough to say, as Judge O'Scannlain contends, that "Congress must have intended to have the laws enforced [extraterritorially] by some member of the Executive branch," for even if Congress did so intend, I cannot conclude that Congress silently designated the DEA officials, rather than the Attorney General, as the Executive branch officials to whom it was entrusting the decision to engage in extraterritorial law enforcement.

In the wake of the brutal murder of DEA Agent Camarena, the Drug Enforcement Administration understandably wanted to capture and punish those who were responsible for the death of one of its own. But in the absence of congressional delegation of the

authority to override another nation's territorial sovereignty—an absence that the majority opinion has amply demonstrated—the decision to sneak into a friendly nation and abduct one of it citizens, in violation of international law, was not for the DEA to make. That decision belonged to the Attorney General and other members of the Cabinet, if not to the President himself. Because the highest levels of the Executive branch played no role in planning or authorizing Alvarez's abduction, and because Congress has not granted the DEA the more general authority to conduct extra-territorial law enforcement activities, I agree that the arrest and detention of Alvarez were arbitrary because they were not "pursuant to law." Alvarez therefore has established a violation of the law of nations that is actionable under the ATCA.

O'SCANNLAIN, Circuit Judge, with whom Circuit Judges RYMER, KLEINFELD, and TALLMAN join, dissenting:

We are now in the midst of a global war on terrorism, a mission that our political branches have deemed necessary to conduct throughout the world, sometimes with tepid or even non-existent cooperation from foreign nations. With this context in mind, our court today commands that a foreign-national criminal who was apprehended abroad pursuant to a legally valid indictment is entitled to sue our government for money damages. In so doing, and despite its protestations to the contrary, the majority has left the door open for the objects of our international war on terrorism to do the same.[1]

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[1] Perhaps cognizant that its analysis cannot bear its own weight if applied more broadly, the majority recites that we need

What makes this astounding pronouncement even more perverse is that our court divines the entitlement to recovery from the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, a statute first enacted over 200 years ago by members of the First Congress, many of whom were Framers of our nation's Constitution. With utmost respect to the majority, there is simply no basis in our nation's law for this bewildering result, and the implications for our national security are so ominous that I must dissent.

I

Notwithstanding the majority's lengthy disquisitions concerning various theories and sources of international

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not worry because its holding "is a limited one." *Supra* at [4a]. Count me, however, among those unassuaged by the majority's assurances. I believe that impermissibly encroaching upon the duties rightfully reserved to the political branches is of serious consequence, and unfortunately such encroachment establishes a very troubling precedent which we will regret. Indeed, the majority's attempt to distinguish the circumstances of this case from other overseas operations conducted by our nation's military and law enforcement personnel may not prove to be so facile. One of the many vexing questions implicated by its opinion, but left unanswered by the majority, is what are we to make of sub-agencies within the Department of Homeland Security, as well as the Federal Bureau of Investigation ("FBI"), the Drug Enforcement Administration ("DEA"), the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), and other law enforcement agents who aid and assist in the war against terrorism and efforts to protect homeland security by capturing known terrorists and criminals in foreign locales across the globe? Unless the majority believes that every use of transborder arrest by the Executive branch falls within "its power to detain under the war powers of Article II," *supra* at [4a] (quoting *Hamdi* v. *Rumsfeld*, 316 F.3d 450, 473 (4th Cir. 2003))—which is obviously not the case—no rational observer can honestly say that our court's holding today "is a limited one."

law, the central issue in this case is very simple: Do American law enforcement agents violate well-established principles of American jurisprudence when they apprehend a duly-indicted suspect outside the confines of our nation's borders?[2] The answer is clearly no; the United States has neither now nor ever agreed to an asserted international law principle prohibiting the practice of transborder abduction.[3]

The majority, perhaps overlooking the grandeur of the forest while gazing with much admiration at the trees, meanders through various sources which suggest how pleasant it would be if transborder abduction were actionable. However, the majority's searching inquiry into the scope of international law is simply unnecessary. The ATCA is a congressionally enacted statute;

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[2] As an initial matter, I am sympathetic with many of the separation of powers concerns expressed in Judge Gould's separate dissent. Indeed, I share a similar apprehension that the majority's approach could have dire consequences if applied to our nation's current military and law enforcement operations overseas.

However, interestingly enough, the government, neither in its brief on cross-appeal nor its amicus brief, argued for the applicability of the political question doctrine. In any event, under our precedent, I believe that Alvarez, while not entitled to relief, has stated a justiciable claim under the ATCA.

[3] I agree with the majority that Alvarez lacks standing to obtain redress under the ATCA for Sosa's and the DEA agents' alleged infraction against Mexican sovereignty; state-on-state injuries like the one Alvarez alleges here are singularly inappropriate for assertion of third-party rights by foreign citizens.

Moreover, I agree with the majority that Alvarez's claim for transborder abduction must fail. However, because the majority reaches this result in a rather circuitous manner, I write separately on this issue to underscore that the United States has neither acquiesced in, nor considers itself bound by, any supposed norm against transborder arrest.

accordingly, international law in this context must first and foremost comport with American case law and congressional intent, rather than be defined by the amorphous expressions of other countries or international experts. In other words, no claim can be actionable under the ATCA based on a norm to which the United States itself does not subscribe.

I do not suggest that the majority's inquiry into the status of transborder arrest in the broader international community—which Congress, by enacting the ATCA, has directed us to perform in appropriate cases—is one beyond the federal courts' ability to undertake. Indeed, some areas of substantial international unanimity are easily recognized. *See, e.g.*, *Trajano* v. *Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litig.) ("Marcos I")*, 978 F.2d 493, 500 (9th Cir. 1992). Nevertheless, I believe that in many cases, as in this one, it will be far easier to determine whether the United States subscribes to a given norm than whether other countries do, and accordingly the former inquiry should appropriately precede the latter.

II

I respectfully suggest that the majority has imprudently ignored the relevant underpinnings of the ATCA. As demonstrated below, a proper historical understanding of the ATCA compels the conclusion that no claim can prevail where the United States, through its political branches, does not acquiesce in an international norm.

A

First enacted as part of the Judiciary Act of 1789, the ATCA still reads today almost exactly as the First

Congress drafted it; the version currently enshrined in Title 28 provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1994); *see* Judiciary Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 73, 77.

The ATCA was, from the beginning, a curious provision. As one eminent scholar of both federal jurisdiction and American legal history notes, the ATCA was one of only two provisions of the Judiciary Act that "arguably g[a]ve federal courts jurisdiction over judicial matters outside the enumeration of Article III." David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801*, at 51-52 (1997).[4] Perhaps because of the singular nature of its jurisdictional grant, the ATCA was infrequently used for almost two hundred years, until fairly recently when courts have eagerly exploited the opportunity to revivify it.

In the course of this resurgence of a statutory provision that lay largely dormant since our nation's founding, our court has determined that certain international law principles may be incorporated into federal common law, and thereby into the ATCA as well. *See Hilao* v. *Estate of Marcos (In re Estate of Ferdinand Marcos,*

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[4] The other was the Act's apparent provision for general alienage diversity jurisdiction, rather than jurisdiction only over controversies between aliens and U.S. states or citizens, as specified in Article III, Section 2. Currie, *supra*, at 51. The Supreme Court subsequently construed the statute's reference to suits "where an alien is a party" to comprehend only suits "between citizens and foreigners," to conform to the Article III grant. *Mossman* v. *Higginson*, 4 U.S. (4 Dall.) 12, 14, 1 L.Ed. 720 (1800) (emphasis omitted).

Human Rights Litig.) ("Marcos II"), 25 F.3d 1467, 1475 (9th Cir. 1994). The *Marcos II* court set out the standard for evaluating whether an ATCA plaintiff states a claim: "Actionable violations of international law must be of a norm that is specific, universal, and obligatory." *Id.*; *accord, e.g.*, *Papa* v. *United States*, 281 F.3d 1004, 1013 (9th Cir. 2002); *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1383-84 (9th Cir. 1998).

B

The requirement of "universality" constitutes an insurmountable bar to recovery for transborder arrest.[5]

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[5] Of the elements required for an actionable norm under the ATCA, "specificity" is, appropriately, the clearest of the three. International law from the time of the ATCA's enactment has been somewhat inchoate, and as the number of international agreements, conventions, and organizations has grown, discerning the substance of the law of nations has required rather more than reading the works of Pufendorf, Burlmaqui, and Vattel with which members of the First Congress were presumably familiar. Moreover, the international community whose customs and practices define the law of nations has become larger and more diverse. It is not surprising, therefore, that frequently the propositions capable of attracting the broadest support are also the most diffuse (and thus the least likely to offend). Yet much diplomatic gloss, though possessing great virtue for its significance to the development of the law of nations in the broadest sense, provides no suitable basis for tort litigation.

A "specific" norm, therefore, is one sufficiently "'definable,'" *Marcos II*, 25 F.3d at 1475 (quoting with approval *Forti* v. *Suarez-Mason*, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987)), such that its violation can be objectively ascertained. To be sure, the nations of the world need not have commonly agreed upon an exhaustive catalogue of every variation, but the norm itself must have become "clear and unambiguous." *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 819-20 (D.C. Cir. 1984) (Bork, J., concurring) (quoting *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980)) (internal quotation marks omitted).

I focus in particular on the corollary of this requirement: a norm of international law not recognized by the United States cannot be deemed a universal one, actionable in this nation's courts.

We have previously noted the importance of determining whether a norm of international law is recognized by the United States. *See Martinez*, 141 F.3d at 1383 ("To determine whether this tort satisfies the requirement for a tort claim under the Alien Tort Act, we must decide '[1] whether there is an applicable norm of international law [proscribing such a tort] . . . *recognized by the United States* . . . and [2] whether [that tort] was violated in [this] particular case.'" (quoting *Marcos I*, 978 F.2d at 502 (alterations in original) (emphasis added))). *Marcos I* did not state this requirement explicitly, but the exposition of the constitutional basis for the ATCA, *see supra* at 612, makes clear that the *Martinez* court correctly recognized that ATCA jurisdiction subsumes it.

Federal common law is a means of preserving a uniform national construction of rights and obligations within a given area of the law even in the absence of a detailed statutory scheme. *See, e.g., Tex. Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-41, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981). This consideration carries particular force in the foreign policy context in which the ATCA lies; it was passed, let us remember, in 1789, only months after the First Congress convened. The Framers, and presumably those who went on to serve the new government, were acutely conscious of the need for the national government's interpretation of the law of nations to be controlling. *See, e.g., The Federalist No. 3*, at 43 (John Jay), No. 80, at 476-77, 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Yet

one equally basic characteristic of federal common law is that Congress may supplant it as the rule of decision, because the power to legislate rests most properly with the elected representatives who possess both the greater competence and the greater authority, conferred by the people, to wield it. And the same is no less true with regard to the law of nations as federal common law; indeed, foreign policymaking is essentially confided not merely to the national government writ large, but to its political branches in particular.[6] *E.g.*, *Chi. & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S. Ct. 431, 92 L.Ed. 568 (1948); *Oetjen* v. *Cent. Leather Co.*, 246 U.S. 297, 302, 38 S. Ct. 309, 62 L.Ed. 726 (1918); *see Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964).

The Framers and the First Congress viewed the United States's substantial adoption of the law of nations as furthering their intention that the new nation take its place among the civilized nations of the world. *E.g.*, *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419, 474, 1 L.Ed. 440 (1793) (opinion of Jay, C.J.). Yet they clearly did not mean for the law of nations to act as an irrevocably binding constraint on the law and policymaking authority of the national government. In his last contribution as Publius, John Jay famously recognized the binding nature of treaties, and a number of the Framers shared his view that treaties created a

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[6] Of course, accepting this principle still leaves open the question of how that responsibility should be allocated *between* the political branches. For present purposes, it is sufficient to say that whatever degree of responsibility the President enjoys vis-à-vis Congress, the political branches collectively enjoy primacy over the judiciary in the management of our foreign relations.

binding obligation on the contracting parties under the law of nations. *The Federalist No. 64*, at 394 (John Jay); *see, e.g.*, Note, *Restructuring the Modern Treaty Power*, 114 Harv. L. Rev. 2478, 2484-90 (2001) (discussing the Framers' views). But the law of nations imposed constraints "in point of moral obligation," not restrictions on national policymakers' power to breach. *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 272, 1 L.Ed. 568 (1796) (opinion of Iredell, J.). The Framers intended that the United States would have the power, if not necessarily the *right* under the law of nations, to violate or even to repudiate aspects of the law of nations, provided it were willing to face the consequences of its breach, possibly including war.[7] And it was for this reason that the power to violate or to repudiate, like the power over foreign affairs generally, was confided to the national government. *See The Federalist No. 80*, *supra*, at 476

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[7] *See, e.g.*, Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1568 (1984) ("[E]very State has the power—I do not say the legal right—to denounce or breach its treaties, or to violate obligations of customary international law." "[I]t is inconceivable that the Constitution intended to make it impossible or impermissible—unconstitutional—for the United States to violate a treaty or other international obligation."). One of the handful of cases sustaining ATCA jurisdiction, *Bolchos* v. *Darrel*, 3 F.Cas. 810 (D.S.C. 1795) (No. 1,607), likewise recognizes the power to depart from the law of nations. *See id.* at 811 ("It is certain that the law of nations would adjudge neutral property, thus circumstanced, to be restored to its neutral owner; but the . . . treaty with France alters that law . . . ."). Although the law of nations did not favor the libelant, the *Bolchos* court found in his favor nonetheless because jurisdiction was proper under the ATCA's *treaty* provision and because the treaty in question conferred an enforceable right to sue. *See id.* Despite *Bolchos's* distasteful subject matter—the action was for recovery of a cargo of slaves—the opinion offers some insight into contemporaneous understanding of the law of nations as enforced by the ATCA.

("[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it."). The federal common law's incorporation of the law of nations, in short, is not beyond the political branches' power to alter. And this fact is entirely consonant with the principle, expressed in our cases as elsewhere, that "[c]ustomary international law, like international law defined by treaties and other international agreements, rests on the consent of states." *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992); *see id.* ("A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm . . . ." (citing Restatement (Third) of the Foreign Relations Law of the United States [hereinafter Restatement] § 102 cmt. d)).

Therefore, where the political branches have exercised their power to diverge from the course that others see the law of nations as setting, ATCA liability cannot lie. The ATCA's conformity with Article III rests on the incorporation of the law of nations as federal common law—particularly in a case like this one, where neither alienage, nor admiralty, nor any of the other headings of Article III provides a basis for federal jurisdiction. It is for this reason that an ATCA plaintiff relying on the law of nations (as opposed to a treaty) must allege a tort that violates some norm of international law recognized by the United States.

At least one of the few Supreme Court opinions to consider the ATCA directly appears to have recognized as much. In *O'Reilly De Camara* v. *Brooke*, 209 U.S. 45, 28 S. Ct. 439, 52 L.Ed. 676 (1908), Justice Holmes

wrote for a unanimous Court in affirming the dismissal of an ATCA complaint that alleged the tortious destruction of a hereditary title during the Spanish-American War. *Id.* at 48-49, 28 S. Ct. 439. Although the Court did not directly decide whether the plaintiff had alleged a tort cognizable under the ATCA, *see id.* at 52-53, 28 S. Ct. 439, it did make the following comment on that question: "[W]e think it plain that where, as here, the jurisdiction of the case depends upon the establishment of a 'tort only in violation of the law of nations, or of a treaty of the United States,' it is impossible for the courts to declare an act a tort of that kind when the Executive, Congress, and the treaty-making power all have adopted the act." *Id.* at 52, 28 S. Ct. 439.

Such analysis fits with our case law's incorporation of the requirement that an actionable norm of international law be "universal." The case at hand does not require us to delineate the bare minimum level of acceptance that would constitute "universality"; instead, it invokes the simple proposition, stated explicitly in *Martinez* and implicitly in other cases, that in determining whether a norm is "universal," the United States is to be counted as a part of the universe. A norm to which the political branches of our government have refused to assent is not a universal norm. It is not the judiciary's place to enforce such a norm contrary to their will.[8]

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[8] The final requirement under our law is that an actionable norm be "obligatory." Our cases have used this term to mean "binding" rather than merely "hortatory." *Marcos II*, 25 F.3d at 1475 (quoting with approval *Forti*, 672 F. Supp. at 1539-40). Binding norms "confer[ ] fundamental rights upon all people vis-a-vis their own governments." *Id.* at 1475-76 (quoting *Filartiga*, 630 F.2d at 885) (alteration in original) (internal quotation marks omit-

ted). Sosa and the DEA agents argue that the class of obligatory norms is further restricted to those that are obligatory in the literal sense, *i.e.*, those that nation-states must obey. In the parlance of international law, such a norm falls under the heading of *jus cogens*.

This argument is not without support in the case law. Courts applying *Marcos II's* tripartite standard have debated whether the only "obligatory" norms whose violation is actionable under the ATCA are those that have attained *jus cogens* status, and indeed, some have adopted the position that the defendants urge. *Compare, e.g., Nat'l Coalition Gov't of the Union of Burma* v. *Unocal, Inc.*, 176 F.R.D. 329, 345 (C.D. Cal. 1997) ("[A] foreign sovereign's expropriation of its national's property does not constitute a *jus cogens* violation of the law of nations and, therefore, is not cognizable under § 1350."), *Xuncax* v. *Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995) ("These qualifications essentially require that . . . the prohibition against [the act in question be] nonderogable and therefore binding at all times upon all actors."), *and Beanal* v. *Freeport-McMoRan Copper & Gold, Inc.*, 969 F. Supp. 362, 370 (E.D. La. 1997) (citing *Xuncax*), *aff'd*, 197 F.3d 161 (5th Cir. 1999), *with Doe* v. *Unocal Corp.*, 110 F. Supp. 2d 1294, 1304 (C.D. Cal. 2000) ("While the Ninth Circuit has not expressly held that only *jus cogen* [sic] norms are actionable, the Circuit's holding in *Estate II* that actionable violations are only those that are specific, universal, and obligatory is consistent with this interpretation."), *and In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001) ("It remains unclear, however, whether all *jus cogens* norms meet the 'specific, universal and obligatory standard' required to be actionable under section 1350."), *with Mehinovic* v. *Vuckovic*, 198 F. Supp. 2d 1322, 1344 (N.D. Ga. 2002) ("A *jus cogens* violation satisfies, but is not required, to meet [the 'specific, universal, and obligatory'] standard.").

However, we need not decide whether the term "obligatory" necessarily means that a *jus cogens* norm is required. Our prior cases have left this question open. And despite the majority's assertion to the contrary, this case does not require us to pronounce definitively on the relevance of the distinction between *jus cogens* and mere customary international law. If Alvarez in

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The majority fails to take into account these fundamental principles, which invoke the historical understanding in which the ATCA was passed and the proper role of the political branches in determining our nation's actions as they relate to national security. As a result, the majority's analysis of the status of transborder arrest as an instrument of law enforcement—which has great bearing on its treatment of Alvarez's alternative claim for relief for arbitrary arrest—is seriously flawed because it ignores the baseline proposition that it is easier for this court to determine whether the United States agrees with a norm than to determine whether a preponderance of the world's other nations does.

Let us recall the particular circumstances of the case at hand. Alvarez was charged in 1990 with, among other offenses, the kidnaping[9] and felony murder of a federal agent in violation of 18 U.S.C. §§ 1114(1) and 1201(a)(5). *See, e.g., Alvarez-Machain II*, 504 U.S. at 657 n.1, 112 S. Ct. 2188. The kidnaping statute appears to contemplate the exercise of federal criminal jurisdiction over certain defendants who are neither Americans nor found in the United States. *See* 18 U.S.C. § 1201(e) (2000) (authorizing the exercise of jurisdiction over defendants if they

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fact alleges violations of a *jus cogens* norm, as did the plaintiffs in the Marcos litigation, or if he alleges violations of a derogable norm to which the United States does not subscribe, we may bypass the significance of *jus cogens* status. The distinction would be significant only if Alvarez alleges violations of a norm that *is* recognized by the United States—and therefore incorporated into the federal common law—but lacks the universal acceptance within the international community that is the *sine qua non* of a *jus cogens* norm.

[9] A 1994 amendment added a second "p" to the term, which now lists the crime as "kidnapping."

are American nationals, if they are found in the United States, *or* "if the victim is a representative, officer, employee, or agent of the United States"). Notwithstanding the majority's assertions to the contrary, the general statutes governing the operation of the Drug Enforcement Administration confer on DEA agents the authority to "make arrests without warrant . . . for any felony, cognizable under the laws of the United States, if [an agent] has probable cause to believe that the person to be arrested has committed or is committing a felony." 21 U.S.C. § 878(a)(3) (2000). DEA agents may also "perform such other law enforcement duties as the Attorney General may designate." *Id.* § 878(a)(5).

This statutory framework confers on the DEA agents the same degree of authority to act extraterritorially that we have previously held INS agents to possess. *See United States* v. *Chen*, 2 F.3d 330 (9th Cir. 1993). In *Chen*, we considered whether the INS was authorized to conduct criminal law enforcement activity outside the United States. We held that "Congress need not confer such authority *explicitly* and *directly* on the INS agents themselves." *Id.* at 333. We inferred from Congress's broad grant of authority to the Attorney General to enforce the immigration laws,[10] and from the extraterritorial applicability of those laws, that the enforcement power extended where the laws themselves extended. *See id.* at 333-34.

Faced with our holding in *Chen*, Alvarez argues, and the majority erroneously agrees, that the criminal

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[10] She had in turn delegated that authority to the Commissioner of Immigration and Naturalization, who in turn delegated it to rank-and-file INS agents. *Chen*, 2 F.3d at 334 (citing 8 C.F.R. § 2.1 (1991)).

context presented in this case is distinguishable from the unique context of border security at issue in *Chen*. Yet the statutes at issue here bear just as directly on national security, particularly insofar as they relate to and promote the federal government's ability to enforce the drug laws, and to protect the agents who carry out that enforcement, no matter on which side of the border they may be threatened. And so our cases have recognized. "Our circuit has repeatedly approved extraterritorial application of statutes that prohibit the importation and distribution of controlled substances in the United States because these activities implicate national security interests and create a detrimental effect in the United States." *United States* v. *Vasquez-Velasco*, 15 F.3d 833, 841 (9th Cir. 1994). As we stated in another prosecution arising from the Camarena abduction and murder: "We have no doubt that whether the kidnapping and murder of [DEA] agents constitutes an offense against the United States is *not* dependent upon the locus of the act. We think it clear that Congress intended to apply statutes proscribing the kidnapping and murder of DEA agents extraterritorially." *United States* v. *Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991).

Applying the reasoning of *Chen* to the statutes that protect American drug enforcement personnel leads to the inescapable conclusion that Congress has authorized federal agents enforcing those statutes to make warrantless arrests beyond our borders—a conclusion at odds with the argument that the United States respects a norm prohibiting transborder arrests.

Moreover, such a norm, which would render a transborder arrest violative of the law of nations absent the host country's consent, does not seem tenable either

as a matter of statutory construction or as a reflection of Congress' likely goal. I can conceive of a number of situations in which the nature of the host country's government, or even the utter nonexistence of a functioning government, *precludes* obtaining the formal sanction of the local judiciary or of the host country. Indeed, in the months since September 11, 2001, the United States government has retrieved a number of individuals from lawless locales of this sort. *See, e.g.*, *Al Odah* v. *United States*, 321 F.3d 1134 (D.C. Cir. 2003). Therefore, the statutory authorization to make arrests overseas for violations of extraterritorially applicable law runs contrary to an alleged prohibition on transborder arrests.

It is true that in a number of other cases dealing with transborder arrests, the nation in which the arrest occurred did not object, even if it did not cooperate. While Mexico, by contrast, clearly and consistently protested Alvarez's seizure, it does not follow that the United States was obliged to comply with the processes of Mexico's judicial system.

One highly visible abduction, that like the case at hand also involved the extraterritorial enforcement of our nation's drug laws, refutes the notion that the United States has somehow divested itself of the authority to engage in transborder arrest without the consent of the host country. *United States* v. *Noriega*, 117 F.3d 1206 (11th Cir. 1997), of course, dealt with the arrest of Panama's former strongman on drug-related charges. *Id.* at 1209-10.[11] Noriega was functioning "as

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[11] For purposes of further illustration, I refer to the recent case of *Kasi* v. *Angelone*, 300 F.3d 487 (4th Cir. 2002). Mir Aimal Kasi on the morning of January 25, 1993, stopped his automobile behind a line of automobiles outside of CIA headquarters in Fairfax

the *de facto*, if not the *de jure*, leader of Panama" when the American military incursion to seize him occurred. *Id.* at 1211. Surely any protest from a Panamanian government controlled by Noriega himself could be disregarded, could it not, particularly if, as a matter of law, Noriega had forfeited his head-of-state immunity? *See id.* at 1212. Moreover—and herein lies the rub—the United States had consistently refused to acknowledge the legitimacy of Noriega's rule from its inception, which was after his indictment but well before the effort to retrieve him was ordered. *Id.* at 1209-10.

Therefore, irrespective of what various international law scholars and others may deem as advisable policy, these ruminations are of little consequence under the

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County, Virginia, emerged from his vehicle, and opened fire on the other drivers with an AK-47 assault rifle. Two CIA employees were killed, and three other employees were wounded. Kasi fled to his home country of Pakistan the day after the shootings in order to avoid arrest. On February 16, 1993, Kasi was indicted for the various crimes that he had committed. For the next four and one-half years, Kasi remained at-large, traveling in Afghanistan and returning to Pakistan only for brief visits. Then, on June 15, 1997, FBI agents located and abducted Kasi from a hotel in Pakistan. Two days later, Kasi was transported back to Fairfax County, Virginia and handed over to state authorities for prosecution. Kasi was eventually convicted and sentenced to death for his crimes. In response, therefore, to the majority's assertion that not "every executive branch decision to breach an international norm translates into a more global repudiation of that norm," *supra* at 620 n. 15, *Kasi*, *Noriega*, and *Chen*, as well as the recent capture of terrorists all across the globe, *see, e.g.*, *Al Odah* v. *United States*, 321 F.3d 1134 (D.C. Cir. 2003), are merely a few examples that demonstrate the consistent refusal of the political branches of this nation's government to adhere to a prohibition against transborder arrests. Consequently, the ATCA should provide no monetary relief to those criminals and terrorists captured pursuant to this valid tool of national security.

ATCA when the political branches of the United States have firmly decided on a course of action. Examining the relevant statutes, the actions of the political branches in other circumstances, and as discussed by the majority, the manner in which the President and the Senate have exercised the treaty power in this area, *see supra* at [22a-26a] leads to only one conclusion: The United States does not, as a matter of law, consider itself forbidden by the law of nations to engage in extraterritorial arrest, but reserves the right to use this practice when necessary to enforce its criminal laws.[12]

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[12] Because the prohibition on transborder arrest is not accepted by the United States and thus is not actionable under the ATCA, it is unnecessary to consider whether, as Sosa and the DEA agents urge, it is not actionable for the additional reason that it does not rise to the level of *jus cogens*.

However, it should be noted that no court, convention, declaration, or authority such as the Restatement has identified transborder abduction as a *jus cogens* norm. Rather *Ker* v. *Illinois*, 119 U.S. 436, 7 S. Ct. 225, 30 L.Ed. 421 (1886), *Alvarez-Machain II*, 504 U.S. 655, 112 S. Ct. 2188, 119 L. Ed. 2d 441 (1992), and *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990), indicate the opposite. *See United States* v. *Matta-Ballesteros*, 71 F.3d 754, 763 n.5 (9th Cir. 1995) (kidnaping does not violate recognized constitutional or statutory provisions in light of *Alvarez-Machain II*, and also does not qualify as a *jus cogens* norm such that its commission would be justiciable in our courts even absent a domestic law). Indeed, on remand in this case, we made it clear that there was no due process violation—put differently, that kidnaping isn't shocking—because it cannot be so fundamental as to constitute a *jus cogens* norm. *Alvarez-Machain III*, 107 F.3d 696, 702 (9th Cir. 1997).

The Restatement, for example, has identified only torture, genocide, slavery, murder, prolonged arbitrary detention, and systematic racial discrimination. Neither do the conventions and declarations upon which Alvarez relies establish universal acceptance.

III

If the majority had merely denied Alvarez's claims based on its exposition of international mores, I would be troubled by its failure to engage in a review of both the history behind the ATCA and the manner in which the political branches have exercised the option of transborder arrest in varied circumstances. But at least I would feel secure that we as judges had not improperly encroached upon the duties reserved for the political branches in formulating our nation's foreign policy. Most regrettably, by providing relief to Alvarez on his claim of prolonged arbitrary arrest, our court has in effect restricted the authority of our political branches, and it has done so in a way that finds no basis in our law.

A

The parties do not dispute that the prohibition on prolonged arbitrary detention is actionable under the ATCA. *See Martinez*, 141 F.3d at 1383-84. Nevertheless, the question remains whether the prohibition was violated in this case.

The International Covenant on Civil and Political Rights was signed and ratified in 1992 but with the understanding by the Senate and Executive Branch that Articles 9 and 10 are not self-executing and may not be relied on by individuals; the American Convention on Human Rights has not been ratified; the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man are not binding legal obligations. None prohibits forcible abduction. Nor does it suffice to rely on general principles such as "rights to freedom of movement, to remain in one's country, and security in one's person."

B

Notwithstanding its express recognition that the criminal statutes covering kidnaping, felony murder, and the other crimes involved in this case extend to conduct outside of the borders of the United States, the majority deems the government's action as "arbitrary." The majority, although not expressly stating it as such, seems most troubled by the lack of Mexican authority for Alvarez's arrest. Indeed, imagine that the DEA had communicated with the Mexican government prior to seizing Alvarez and that such dialogue led to Mexican authorities assisting in the arrest, or acknowledging consent to the DEA's actions in some other manner. Under the majority's proffered approach the United States would be forced to compensate an alleged foreign-national criminal for "arbitrary arrest" within the meaning of the law of nations merely because the "wrong" Executive agency spearheaded the operation.

If Mexico had indeed sanctioned its actions, our court would not be subjecting the DEA to liability for successfully negotiating via diplomatic means the capture of a wanted criminal. Or would it? This simple hypothetical, however, underscores the fallacy of the majority's approach. Whether the United States procured an arrest warrant through the Mexican judiciary should not affect our analysis, because the availability of local process is extremely sensitive, bound up with important foreign policy considerations that are confided to the political branches in general and to the Executive in particular. Indeed, the majority elsewhere recognizes that "an individual's right to be free from transborder abductions has not reached a status of international accord sufficiently to render it 'obligatory' or 'univer-

sal,' [and therefore] cannot qualify as an actionable norm under the ATCA." *Supra* at [27a].

Nevertheless, seemingly under the majority's approach, such extraterritorial arrest authority may still be subject to a requirement that any agents exercising it on foreign soil—as opposed to the high seas, as was the case in *Chen*, 2 F.3d at 332—obtain the consent or assistance of the host country. The majority, in a rare moment of restraint, does recognize the "powers of the political branches to override the principles of sovereignty in *some* circumstances, should the need arise." *Supra* at [47a] (emphasis added). However, the "need" to engage in transborder arrest without the prior consent of a foreign nation should appropriately be left to the discretion of the political branches.

Indeed, the federal courts are not charged with determining the legitimacy of another nation's government. Yet this is essentially what the majority would have us do. Under its approach, the United States would have departed from the ostensibly black-and-white approach that sanctions transborder arrests when employed by our nation's political branches. In its place, a decision to make a transborder arrest would only be permissible when the host country's system of government absolutely requires it, as determined by this country's courts through the medium of ATCA litigation. As judges, we would have to determine whether a nation's courts are open and functioning; whether it has a legitimate government that can be consulted for permission to seize a suspect; if there are multiple contenders, *see, e.g.*, *Noriega*, 117 F.3d at 1209-10, to which one such a request must be addressed; and so on. Courts are quite unsuited to undertake such analyses, and, indeed, to do so would bring us perilously

close to trenching on the power of diplomatic recognition that Article II, Section 3 places at the core of the Executive's foreign affairs authority. *See, e.g.*, *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 137-38, 58 S. Ct. 785, 82 L.Ed. 1224 (1938); *Oetjen*, 246 U.S. at 302-03, 38 S. Ct. 309.

I am simply not prepared to declare that Congress intended that any alien charged with a crime, under extraterritorially applicable U.S. criminal law, could remain in a country that refuses extradition. Congress has authorized the arrest, without warrant, of aliens for whom there is probable cause to suspect violation of an extraterritorially applicable statute. In so doing, Congress has left to the Executive, which already possesses the general responsibility for deciding both when and whether to arrest and to prosecute and how best to conduct the nation's foreign relations, the burden of determining when the national interest requires bypassing diplomatic channels to secure such arrest. As the Supreme Court has held in another context, "Situations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 275, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990).

C

Turning now to its proffered reason for granting Alvarez redress under the ATCA, the majority claims

there was "no basis [under United States] law for the DEA's actions." *Supra* at [50a].

1

The majority reaches this extraordinary result even though it concedes that the United States has reserved for itself the authority to arrest criminals and terrorists abroad as a valid law enforcement technique, and that Congress has explicitly extended the reach of criminal statutes for which Alvarez was charged to apply to conduct outside of the nation's borders. Even more astonishing is that the majority bases its holding on the premise that the DEA's actions were "arbitrary" within the meaning of the law of nations because they were beyond the scope of authority conferred by Congress.

In this case, Alvarez was arrested pursuant to an American warrant, issued following his indictment by a federal grand jury on felony charges. He was held overnight and then brought to the United States, where he was promptly placed in federal custody and was arraigned as soon as his medical condition permitted. The majority fails to explain adequately how an arrest supported by probable cause and ordered by a warrant, leading to a brief period of confinement before transfer to custody on American soil with all its attendant legal process, rises to the level of arbitrary detention merely because a parallel warrant was not obtained from the harboring state.

This view does not necessarily render such a seizure legal in every respect; we are limited here to the question whether the arrestee can recover in tort under the Alien Tort Claims Act, which presupposes a viola-

tion of the law of nations.[13] Whatever false arrest claim Alvarez might have, he has not stated a violation of the law of nations to which we adhere.

2

In any event, contrary to the majority's surmise, the DEA was well within its delegated powers when arresting Alvarez. The relevant statutory provisions confer on DEA agents the authority to "make arrests . . . *for any felony*, cognizable under the laws of United States" and the added authority to "perform such other law enforcement duties as the Attorney General may designate." 21 U.S.C. § 878(a) (emphasis added). Because it is undisputed that Congress has authorized the extraterritorial application of the criminal statutes for which Alvarez was charged, *see supra* at [35a-38a], this broad legislative delegation of enforcement powers to the DEA would seemingly sanction the extraterritorial arrests at issue in this case.

Nevertheless the majority would narrow this broad delegation of enforcement power and restrict the

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[13] It is important to note that Alvarez did bring a number of other claims which, if proven, might well have been cognizable —under the ATCA or otherwise. He alleged that he suffered cruel and degrading treatment, that he was subjected to assault and battery, that his captors had intentionally inflicted emotional distress. The district court took several of these claims to trial and resolved each of them in Sosa's favor, finding that Alvarez was not credible. The only ATCA claims that survived for appeal were those relating to the undisputed fact of Alvarez's seizure, not his allegations of abuse, torture, or mistreatment. But in the appeal before us, it is clear that the mere fact of a transborder arrest without the host country's consent is not actionable under the ATCA, absent a substantiated claim of mistreatment that independently violates aspects of the law of nations that the United States recognizes.

DEA's authority to engage in transborder arrests because it concludes that it would be "anomalous" for Congress to confer a similar degree of authority to "any State or local law enforcement officer designated by the Attorney General." *Supra* at [41a-42a]. However, there is nothing "anomalous" about the legislative branch delegating to the Attorney General to determine in his best judgment whether non-federal law enforcement agents can aid in the application and enforcement of this nation's criminal laws extraterritorially. Instead, Congress engaged in such a broad delegation of law enforcement authority to the DEA and to the Attorney General in order to allow the Executive branch to have the widest array of enforcement options at its disposal.

In addition to the clear language of 21 U.S.C. § 878(a), this court's statutory interpretation is guided by the Supreme Court's recognition that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta* v. *United States*, 488 U.S. 361, 372, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). Furthermore, "[d]elegation of foreign affairs authority is given even broader deference than in the domestic area." *Freedom to Travel Campaign* v. *Newcomb*, 82 F.3d 1431, 1438 (9th Cir. 1996). "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than it customarily wields in domestic areas." *Id.* (quoting *Zemel* v. *Rusk*, 381 U.S. 1, 17, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965)).

Nevertheless, the majority claims there is an utter void of authority for the DEA's actions. The majority is undeterred by the fact that Congress has authorized the extraterritorial application of the criminal statutes

involved in this case and has delegated broad powers of enforcement to the DEA "for any felony, cognizable under the laws of the United States." The majority's holding flies in the face of the clear statutory language enacted by Congress as well as the principle of statutory construction that delegations to the Executive branch are entitled to greater judicial deference in matters involving politically sensitive foreign affairs.

Furthermore the majority's approach leads unavoidably to the following question: if Congress through enactment of 21 U.S.C. § 878(a) has not in fact authorized the DEA and Attorney General to enforce extraterritorially the criminal laws for which Alvarez was charged, to whom exactly has Congress delegated this enforcement authority? By extending the reach of our criminal laws to apply to conduct outside of the nation's borders, Congress must have intended to have the laws enforced by some member of the Executive branch.[14]

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[14] In a separate concurrence, Judge Fisher seemingly concedes that Congress has authorized the Executive branch to engage in extraterritorial law enforcement activities, but nonetheless divines that such decisions have to be made by the "President, the Attorney General, the Secretary of State, perhaps the Secretary of Defense, the National Security Advisor." *Supra* at [73a] (Fisher, J., concurring). However, in matters of foreign affairs, nation-states are often intentionally guarded as to precisely which government officials authorize and possess knowledge of covert operations. Furthermore, regardless of whether it is desirable public policy to require high-ranking officials to admit their participation in complex international operations in order to shield the United States and its "sub-Cabinet-level enforcement officials" from liability under the ATCA, there is simply no basis in the Constitution, existing statutes, or our case law for such a legal conclusion.

Under the majority's approach, this nation would be left to the whims of foreign countries in enforcing its laws because Congress, in delegating broad law enforcement powers to the Executive branch, did not redundantly recite that extraterritorial enforcement is to be included.[15]

3

Both the statutory structure and our own precedent indicate that the criminal provisions in question apply extraterritorially. Correspondingly, the statutes and precedent also indicate that Congress has authorized their extraterritorial enforcement. Under such circumstances, we are not free to conclude that the political

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Judge Fisher tries to find support for his position from a 1989 advisory opinion issued by an attorney in the Department of Justice's Office of Legal Counsel. This advisory opinion expressly recognized the authority of the Attorney General to depart from the norms of international law in the course of law enforcement activities, even without the approval of the President. The opinion then "recommend[s], however, that the Attorney General [not] delegate the authority to more subordinate officials." *Supra* at [77a] (Fisher, J., concurring).

As a matter of public policy, this advisory opinion may be of interest to show how the Executive branch might exercise the discretion conferred to it by Congress to engage in extraterritorial law enforcement activities. But such an advisory opinion, of course, neither constitutes binding law nor justifies the newly minted judicial constraints proposed by Judge Fisher to be imposed upon the Executive branch for conducting foreign affairs.

[15] While today's holding may seem innocuous with regard to Mexico, "an important ally and trading partner," the current war on terror in Afghanistan and in other countries, *Kasi*, and *Noriega* are but a few examples that illustrate that such an approach would unduly interfere with the Executive branch's ability to carry out its prescribed duties regarding law enforcement and national security.

branches have bound themselves—or, to be more precise, have bound the Executive—to the mast. And the prospect of international opprobrium is not sufficient for us as judges to impose a constraint the political branches have not.[16]

IV

Dr. Alvarez's capture and delivery to the United States may have offended the sensibilities of some members of our court. As a matter of public policy, such actions may even be worthy of the condemnation that certain pundits and foreign countries, as cited by the majority, have bestowed. But we are not asked in this case to condemn or to condone the federal government's actions; we are asked to compensate Dr.

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[16] The majority also concludes, as to Alvarez's Federal Tort Claims Act ("FTCA") claims, that the DEA agents authorized a false arrest against Alvarez. That Congress intended several of the federal statutes that Alvarez was charged with violating to be both applicable and enforceable beyond the borders of the United States, effectively begins and ends this inquiry. The federal officers were authorized by statute to make warrantless arrests. And the provision in Rule 4(d)(2) of the Federal Rules of Criminal procedure that a "warrant may be executed . . . at any place within the jurisdiction of the United States"—a provision that, when adopted, was intended to *broaden* the territorial scope of a federal court's power to issue process, *see* Fed. R. Crim. P. 4 advisory committee's note—does not preclude federal authorities from obtaining an arrest outside the United States when Congress has authorized them to enforce an extraterritorially applicable statute beyond the national borders.

In light of the statutory authority under which the agents secured Alvarez's arrest in Mexico, the contention that their action was compensable in tort under the FTCA must fail. The district court did not err in granting summary judgment to the United States on the FTCA claims.

Alvarez in tort under the law of nations. The decision to exercise the option of transborder arrest as a tool of national security and federal law enforcement is for the political branches to make. They, unlike the courts, may be held accountable for any whirlwind that they, and the nation, may reap because of their actions. By its judicial overreaching, the majority has needlessly shackled the efforts of our political branches in dealing with complex and sensitive issues of national security. After today's ruling, if the political branches are intent on protecting the security interests of our nation by arresting and prosecuting those who would do the country harm, Congress and the President should also ensure that the United States Treasury is well-stocked to compensate the captured miscreants.

GOULD, Circuit Judge, dissenting:

I respectfully dissent because this case presents a nonjusticiable political question requiring scrutiny of an executive branch foreign policy decision. The majority passes judgment on an executive branch decision to act against foreign nationals on foreign soil in a matter directly affecting the United States's relations with a foreign nation.[1] Because our Constitution entrusts the conduct of our nation's foreign policy to Congress and to the executive branch, this case poses a political question decidedly inappropriate for judicial review.

The Supreme Court has held that certain allegations of illegal government action should not be ruled on by the federal courts even though all jurisdictional requirements are met. The Court has said that decision

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[1] Alvarez's apprehension by Mexican nationals was directed by the Drug Enforcement Administration (DEA), acting under authority delegated from the Attorney General[.]

in these areas should be left to the politically accountable branches of government, the executive branch and Congress. The reasons for this political question doctrine have been variously described,[2] but, at its core, the political question doctrine represents the judiciary's wise recognition that the structure of our Constitution, its separation of powers, requires judicial restraint when certain subjects are at issue.

The Supreme Court in *Baker* v. *Carr* made the classic statement of the considerations that animate the political question doctrine:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or an unusual need or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from

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[2] The political question doctrine minimizes judicial intrusion into the operations of the other branches of government. *See Gilligan* v. *Morgan*, 413 U.S. 1, 7, 93 S. Ct. 2440, 37 L. Ed. 2d 407 (1973). It limits the courts' role in a democratic society. Alexander Bickel, *The Least Dangerous Branch* 184 (1962). It preserves the courts' legitimacy. *Baker* v. *Carr*, 369 U.S. 186, 267, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) (Frankfurter, J., dissenting). And it allocates decisions to the branches of government that have superior expertise. *See* Fritz Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517, 567 (1966).

> multifarious pronouncements by various departments on one question.

369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). The Court held that any one of the above-listed characteristics may be sufficient to preclude judicial review. *Id.*

Most significantly for this case, the Court has held that the considerations described in *Baker* v. *Carr* bar judges from reviewing the executive branch's foreign policy decisions:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil.

Chicago & S. Airlines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S. Ct. 431, 92 L.Ed. 568 (1948). *See also Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302, 38 S. Ct. 309, 62 L.Ed. 726 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislat[ure,] 'the political' Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 315, 57 S. Ct. 216, 81 L.Ed. 255 (1936) (holding nonjusticiable the question of the legality of a congressional resolution because "[t]he whole aim of the resolution [was] to affect a situation entirely

external to the United States, and falling within the category of foreign affairs"). In other words, judges should not interfere in the management of our nation's foreign policy by opining (as the majority opines) on the executive's foreign policy decisions.

The DEA officials' decision to abduct Alvarez from Mexico without the Mexican government's permission was an executive foreign policy decision. Soon after a federal grand jury indicted Alvarez for murder, DEA officials negotiated with Mexican government officials for Alvarez's capture. When those negotiations proved unsuccessful, DEA officials decided it would be in the United States's interest to accomplish Alvarez's capture by means other than extradition. The officials' decision was consistent with a United States policy, formally announced in 1989, that it was permissible for law enforcement agencies such as the DEA to apprehend individuals accused of violating United States criminal law in foreign states without the consent of the foreign state. Barry E. Carter & Phillip R. Trimble, *International Law* 794 (3d ed. 1999).

The foreign-policy nature of the DEA officials' decision to order Alvarez's capture in Mexico is amply demonstrated by the world's response to the incident. Mexico requested an official report on the role of the United States in the abduction and later sent diplomatic notes of protest from its embassy to the United States Department of State. Mexico also requested the arrest and extradition of the American law enforcement agents allegedly involved in the abduction. After the United States Supreme Court declined to invalidate Alvarez's capture, twenty-one member states of the Ibero-American Conference argued before the United Nations General Assembly that the extraterritorial

exercise of criminal jurisdiction through the use of unilateral measures of coercion, such as abductions, violates the law of nations. Virginia Morris & M.-Christiane Bourloyannis-Vrailas, *The Work of the Sixth Committee at the Forty-Eighth Session of the UN General Assembly*, 88 Am. J. Int'l L. 343, 357 (1994). The Iranian Parliament passed a draft law giving the president of Iran the right to arrest Americans who take action against Iranian citizens or property anywhere in the world and to bring them to Iran for trial. Carter and Trimble, *supra*, at 794. The Canadian Min[i]ster of External Affairs told the Canadian Parliament that any attempt by the United States to kidnap someone in Canada would be regarded as a criminal act and a violation of the U.S.-Canada extradition treaty. *Id.* at 792. The lower house of Uruguay's parliament voted that the United States's policy of unilaterally abducting foreign nationals showed "a lack of understanding of the most elemental norms of international law, and in particular an absolute perversion of the function of extradition treaties." *Id.* The presidents of Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay issued a declaration expressing their concern. *Id.* These are only a few of the dozens of acts of diplomatic protest to the United States's policy of extraterritorial abduction, of which Alvarez's capture was the first well-publicized example.

The international response to Alvarez's capture was predictable, and executive officials may well have weighed it in determining whether to order that action. If the capture were merely an "exercise of the executive's law enforcement powers," as the majority suggests, rather than a foreign policy decision, the capture would not have become an international diplomatic

incident. Indeed, the foreign-policy ramifications of international abduction have been well-known for decades, at least since the United Nations Security Council determined in 1960 that Israeli agents' abduction of the Nazi war criminal Adolf Eichmann from Argentina violated that country's sovereignty. Mary Alice Kovac, *Apprehension of War Crimes Indictees: Should the United Nations' Courts Outsource Private Actors to Catch Them?*, 51 Cath. U.L. Rev. 619, 631 (2002).

The foreign-policy nature of the decision to capture Alvarez is also demonstrated by the executive branch's policies governing this type of arrest. Executive branch officials have told Congress that agents follow

> procedures designed to ensure that U.S. law enforcement activities overseas fully take into account foreign relations and international law. These procedures require that decisions as to extraordinary renditions from foreign territories be subject to full inter agency coordination and that they be considered at the highest levels of the government.

Carter and Trimble, *supra*, at 794. The Department of Justice has codified these special foreign-policy procedures in its United States Attorneys' Manual:

> Due to the sensitivity of abducting defendants from a foreign country, prosecutors may not take steps to secure custody over persons outside the United States (by government agents or the use of private persons, like bounty hunters or private investigators) by means of *Alvarez-Machain* type renditions without advance approval by the Department of Justice. Prosecutors must notify the Office of

> International Affairs before they undertake any such operation.

Department of Justice, *United States Attorneys' Manual*, § 9-15.610 (1997). These executive branch procedures demonstrate that the capture of a foreign national on foreign soil is no ordinary law enforcement choice; rather, it is a serious foreign policy decision.

The DEA officials' decision to order the capture of a foreign national on foreign soil involved delicate foreign policy questions: Did the need to prosecute Alvarez for the torture and murder of an American official justify the United States's taking actions that might offend Mexico's government? Did the desire to send a tough message to foreign governments and drug cartels[3] justify the United States's taking actions that might offend other nations' conceptions of international law? Did the benefits to the United States of ordering Alvarez's capture outweigh any potential diplomatic or trade retaliation Mexico might take?

These questions, and other questions DEA officials may have considered (some of them beyond a judge's imagining), are beyond the competence and jurisdiction of federal judges. Unlike DEA officials, federal judges do not negotiate with foreign officials on behalf of the United States. Federal judges do not seek to influence foreign governments to accomplish the United States's

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[3] Alan J. Kreczko, then Deputy Legal Adviser to the State Department, told Congress that some foreign governments "noted in private that [the United States policy of apprehending criminals overseas] will cause narcotics traffickers to have an increased fear of apprehension by the United States." Carter and Trimble, *supra*, at 794. Executive officials may have weighed this potential benefit to the United States when deciding whether to order Alvarez's capture on Mexican soil.

policy objectives. Federal judges do not specialize in combating the international drug trade. Federal judges do not routinely work with the State Department. Federal judges do not commonly maintain relationships with overseas officials. Federal judges do not possess special training or knowledge relevant to drug interdiction on foreign soil.

Despite these deficits, the majority passes judgment on the executive branch's conduct of its constitutionally assigned responsibility. In doing so, the majority interferes with a delicate and complex decision "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Waterman*, 333 U.S. at 111, 68 S. Ct. 431. *See also Baker*, 369 U.S. at 211, 82 S. Ct. 691 (noting that foreign policy issues "frequently turn on standards that defy judicial application or involve the exercise of a discretion demonstrably committed to the executive or legislature").

The majority's decision injects a new and worrisome factor into executive officials' foreign policy calculus. Executive officials now must consider not only the international implications of their decisions, but also the possibility that federal judges, and eventually juries,[4] will disapprove of their management of the nation's foreign policy. When executive officials consider whether to order action on foreign soil, they should properly weigh the possibility of diplomatic protests, international friction, and trade sanctions. They should not

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[4] We should be concerned with the possibility that parties will urge juries with no foreign policy expertise to "send a message" to the United States government that particular foreign policy actions violate international norms of civilized conduct, as advanced by self-interested advocates. This is no way to conduct a foreign policy.

be required also to weigh the possibility of tort lawsuits by foreign nationals seeking punitive damages in their own nation's courts. They should not be required to consider the possible embarrassment such lawsuits will entail for them or for the United States. The majority's error allows the fear of tort lawsuits to taint officials' already complicated foreign policy analysis. *Cf. Johnson* v. *Eisentrager*, 339 U.S. 763, 789, 70 S. Ct. 936, 94 L.Ed. 1255 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.").

The majority's second-guessing of the executive branch's decision to capture Alvarez is also unseemly in that it prevents our government from speaking with a single voice on an important foreign policy decision. This feature of the majority decision is inconsistent with the Supreme Court's *Baker* v. *Carr* decision, which identified "multifarious pronouncements by various departments on one question" as an evil against which the political question doctrine guards. *See Baker*, 369 U.S. at 217, 82 S. Ct. 691. *See also id.* at 211, 82 S. Ct. 691 (noting that foreign policy questions "uniquely demand single-voiced statement of the Government's views"). By effectively taking the side of Mexico in this international dispute, the majority invades the province of the executive branch and embarrasses the United States on the international stage. The majority decision undermines not only the United States's foreign policy objectives, but also the unelected judiciary's fragile legitimacy with the American public.

The majority makes an unconvincing effort to limit its decision's scope.[5] Despite that effort, the grave implications of the majority decision are plain. By holding that federal courts can review for compliance with international law executive branch decisions to act against foreign nationals on foreign soil, the majority transforms the executive branch's foreign policy decisions into occasions for judicial review. The detention and interrogation of suspected terrorists in Afghanistan; the bombing of Iraq; intelligence gathering around the world—under the majority's holding, these and other foreign policy actions may be the next subject of federal court litigation. The majority unintentionally licenses the United States's enemies, or those who desire to embarrass the United States, to use the federal courts for the purpose of propaganda or to accomplish more insidious ends. This use of the federal courts is altogether inappropriate, and the political question doctrine should guard against it.

The Supreme Court's past decisions in cases implicating foreign policy underscore the need to dismiss this case because it presents a nonjusticiable political question. The Supreme Court has held that it is improper for a court to review the executive's recognition of a foreign government, *Oetjen*, 246 U.S. at 302; to review the executive's determination that an individual claim-

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[5] Perhaps recognizing the manifold difficulties its decision creates, the majority attempts to limit its holding by reciting that it "does not speak to the authority of other enforcement agencies or the military, nor to the capacity of the Executive to detain terrorists or other fugitives under circumstances that may implicate our national security interests." I am concerned that the line the majority tries to draw in limiting its decision is more illusory than real.

ing immunity possess diplomatic status, *In re Baiz*, 135 U.S. 403, 432, 10 S. Ct. 854, 34 L.Ed. 222 (1890); to review the executive's determination that a ship owned by a foreign nation is immune from in rem jurisdiction, *Ex Parte Peru*, 318 U.S. 578, 588-89, 63 S. Ct. 793, 87 L.Ed. 1014 (1943); to review the constitutionality of an undeclared war, *Atlee* v. *Richardson*, 411 U.S. 911, 911, 93 S. Ct. 1545, 36 L. Ed. 2d 304 (1973) (affirming, without opinion, *Atlee* v. *Laird*, 347 F. Supp. 689, 705-07 (E.D. Penn. 1972)); to review the political branches' decision to prohibit arms sales to certain countries, *Curtiss-Wright*, 299 U.S. at 315, 329, 57 S. Ct. 216; to review the executive's assignment of foreign air routes, *Waterman*, 333 U.S. at 113-14, 68 S. Ct. 431; to review the political branches' determinations of when hostilities on foreign soil began or ended, *Ludecke* v. *Watkins*, 335 U.S. 160, 167-69, 68 S. Ct. 1429, 92 L.Ed. 1881 (1948); and, most relevant to this case, to judge whether the executive acted unlawfully in sending American troops to foreign soil. *Eisentrager*, 339 U.S. at 788-89, 70 S. Ct. 936.

An exercise of jurisdiction by federal courts in these cases deemed nonjusticiable by the Supreme Court—like the majority's exercise of jurisdiction in this case—would have divided our nation's government, pitting the judiciary against the political departments in matters involving our nation's conduct of foreign affairs. The majority's holding today that courts may review executive branch decisions to act against foreign nationals on foreign soil for compliance with international law poses at least as great a threat to our nation's foreign policy as did judicial review in the cases de-

scribed above.[6] The Supreme Court, for more than a century, has consistently rejected the attempts of interested litigants to use the federal courts as a weapon against the political branches' conduct of foreign affairs. It is unfortunate that the majority does not likewise recognize this restraint on our judicial power.

The Supreme Court's cases on the nonjusticiability of foreign policy decisions are not the only Supreme Court pronouncements that require us to reject Alvarez's lawsuit. The Supreme Court's enumeration in *Baker* v. *Carr* of the considerations relevant to determining whether a case presents a political question also requires dismissal. First, the majority's review of the executive branch decision to capture Alvarez ignores our Constitution's commitment of foreign policy decisions to Congress and the executive. *See Baker*, 369 U.S. at 217, 82 S. Ct. 691 (referring to "commitment of the issue to a coordinate political department" and a "policy determination of a kind clearly for nonjudicial discretion"). Second, it ignores the fact that federal judges lack the knowledge or training or tools to decide when such action is appropriate for the United States's foreign policy. *See id.* (referring to "a lack of judicially discoverable and manageable standards"). Third, it shows disrespect for the executive branch's management of foreign policy. *See id.* (referring to "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate

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[6] This case should have been dismissed not only as to the United States and the DEA agent defendant, but also as to Francisco Sosa, for he was acting under the direction of the United States, and it would be difficult to decide the propriety of his actions without commenting on the propriety of the executive's actions.

branches of government"). Fourth, it causes our government to speak with inconsistent voices about an issue on which our government should speak with one voice. *See id.* (referring to "the potentiality of embarrassment from multifarious pronouncements by various departments on one question" and "an unusual need for unquestioning adherence to a political decision already made").

Any *one* of the *Baker* v. *Carr* considerations is sufficient to render a case nonjusticiable. *Id.*; *Made in the USA Found.* v. *United States*, 242 F.3d 1300, 1312 (11th Cir. 2001). In this case, all of the *Baker* v. *Carr* considerations weigh sharply in favor of nonjusticiability. The majority errs by deciding the merits of this case.[7]

Human nature being what it is, and judicial nature following human nature, it is only natural that well-meaning judges will desire to comment on important affairs of the day involving political relations with other nations.[8] But if the judiciary is to preserve its le-

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[7] If I am mistaken that this case must be dismissed as presenting a non-justiciable political question, then I agree with Judge O'Scannlain's dissenting opinion that federal law authorized the DEA agents' conduct. *See supra* at [81a] (en banc) (O'Scannlain, J., dissenting).

[8] It is not surprising that judges would want to promote the rule of law, including international law, particularly if they can have the last word on what that law requires. But that is no justification for an improvident exercise of an essentially political power concerning foreign affairs. The failure of my colleagues in the majority to address the political question doctrine, and the modest attention given it by my colleagues in dissent, *see supra* at [82a] n.2 (O'Scannlain, J., dissenting), might be explained by the government's failure to raise this issue. However, because the political question doctrine affects our jurisdiction, and because the political implications of this case for executive branch actions on

gitimacy, to show the respect due coordinate branches of government, and to avoid interfering in our nation's foreign relations, judges must show more restraint than the majority shows today. If ever there was a case in which the Supreme Court should revisit the political question doctrine and limit judicial interference in questions "in their nature political," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803), this is that case.[9]

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foreign soil affecting relations with foreign nations are grave and apparent, I believe the issue must be considered sua sponte and fronted. Of course, it is not too late for the government, in seeking corrective review by petition for writ of certiorari, to advance the position that the political question doctrine precludes jurisdiction.

[9] Even if this case did not present a nonjusticiable political question, it still should have been dismissed in part for lack of jurisdiction because the United States has not waived its sovereign immunity from lawsuits based upon the "discretionary functions" of government employees. *See* 28 U.S.C. § 2680(a). Because DEA officials' decision to order Alvarez's capture involved an element of judgment or choice based on considerations of public policy, *United States* v. *Gaubert*, 499 U.S. 315, 322-23, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), it was a discretionary function that cannot be the subject of litigation against the United States. This jurisdictional flaw is not waivable, so the parties' failure to argue it does not justify our not considering it. *See, e.g., In re Di Giorgio*, 134 F.3d 971, 974 (9th Cir. 1998). The claims against the United States and its employees could not proceed. The United States's sovereign immunity would not, however, prevent our exercising jurisdiction over Alvarez's claims against Sosa.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 99-56762, 99-56880

HUMBERTO ALVAREZ-MACHAIN, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; HECTOR BERELLEZ; BILL WATERS; PETE GRUDEN; JACK LAWN; ANTONIO GARATE-BUSTAMANTE; FRANCISCO SOSA, AND FIVE UNNAMED MEXICAN NATIONALS CURRENTLY IN THE FEDERAL WITNESS PROTECTION PROGRAM, DEFENDANTS-APPELLEES

HUMBERTO ALVAREZ-MACHAIN, PLAINTIFF-APPELLEE

v.

FRANCISCO SOSA, AND FIVE UNNAMED MEXICAN NATIONALS CURRENTLY IN THE FEDERAL WITNESS PROTECTION PROGRAM, DEFENDANT-APPELLANT

Argued and Submitted: June 11, 2001
Filed: Sept. 11, 2001

Appeal from the United States District Court for the Central District of California; Stephen V. Wilson, District Judge, Presiding. D.C. No. CV 93-04072-SVW-06, D.C. No. CV 93-04072-SVW

Before: SCHROEDER, Chief Judge, GOODWIN, Circuit Judge, and KING,[1] District Judge.

GOODWIN, Circuit Judge:

The appeal and cross-appeals in this case challenge a number of rulings in the litigation which followed the arrest of Humberto Alvarez-Machain ("Alvarez") at his office in Guadalajara by Mexican civilians, including Jose Francisco Sosa ("Sosa"), at the behest of United States Drug Enforcement Agency ("DEA") agents.

FACTUAL & PROCEDURAL BACKGROUND

Alvarez is a medical doctor. He practices in Guadalajara, Jalisco, Mexico. In February, 1985, DEA Special Agent Enrique Camarena-Salazar ("Camarena") was abducted and brought to Guadalajara, tortured, and murdered. Alvarez was present at the house where Camarena was held. In 1990 a federal grand jury in Los Angeles indicted Alvarez for his involvement in the incident, and a warrant was issued for his arrest. DEA Headquarters approved the employment of Mexican nationals to apprehend Alvarez in Mexico and to bring him to the United States. The DEA hired Garate-Bustamente ("Garate"), a Mexican informant, to contact Mexican nationals whom he believed could help in apprehending Alvarez in Mexico. Garate contacted a Mexican businessman, Ignacio Barragan ("Barragan") to assist in the operation. In March, 1990, Barragan asked a former Mexican policeman, Sosa, to participate in Alvarez's apprehension. Barragan told Sosa that the DEA had a warrant for Alvarez's arrest, would pay the operation's expenses, and, if he succeeded in bringing

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[1] Honorable Samuel P. King, Senior United States District Judge, for the District of Hawaii, sitting by designation.

Alvarez to the United States, would recommend Sosa for a Mexican government position.

On April 2, 1990, Sosa and others apprehended Alvarez at his office and held him overnight at a motel. The next day, they flew Alvarez to El Paso, Texas, where federal agents arrested him. Less than twenty-four hours passed between Alvarez's apprehension in Mexico and his transfer to federal custody in El Paso.

Alvarez was brought to Los Angeles for trial and remained in detention from April 1990 until December 1992. Alvarez argued that the federal courts lacked jurisdiction to try him because his arrest violated the United States-Mexico Extradition Treaty. *See United States* v. *Caro-Quintero*, 745 F. Supp. 599, 601 (C.D. Cal. 1990). The district court and the Ninth Circuit agreed with him, *see id.* at 614 and *United States* v. *Alvarez-Machain*, 946 F.2d 1466, 1466-67 (9th Cir. 1991), but the Supreme Court disagreed and remanded the case for trial. *See United States* v. *Alvarez-Machain*, 504 U.S. 655, 669-70, 112 S. Ct. 2188, 119 L. Ed. 2d 441 (1992). Alvarez was acquitted, *see Alvarez-Machain* v. *United States*, 107 F.3d 696, 699 (9th Cir. 1996), and he returned to Mexico.

On July 9, 1993, Alvarez filed this action in which he asserted against the United States, Sosa, Garate, five unnamed Mexican civilians, and DEA agents Jack Lawn, Peter Gruden, William Waters, and Hector Berrellez the following claims: (1) kidnaping, (2) torture, (3) cruel and inhuman and degrading treatment or punishment, (4) arbitrary detention, (5) assault and battery, (6) false imprisonment, (7) intentional infliction of emotional distress, (8) false arrest, (9) negligent employment, (10) negligent infliction of emotional distress, and (11) various constitutional torts. The defendants

moved to dismiss the complaint. The district court in 1995 granted the motion in part and denied the motion in part. We affirmed in part, reversed in part, and remanded the matter to the district court. *See Alvarez-Machain*, 107 F.3d at 701.

On summary judgment, the district court entered a judgment against Sosa for kidnaping and arbitrary detention under the Alien Tort Claims Act ("ATCA"). The district court held that Alvarez could recover damages only for his detention prior to his arrival in the United States, applied United States rather than Mexican damage laws, and awarded Alvarez $25,000. The district court substituted the United States for the DEA agents and dismissed Alvarez's Federal Tort Claims Act ("FTCA") claims. Alvarez has appealed the district court's decision to substitute the United States for the DEA agents and its dismissal of his FTCA claims of false arrest, false imprisonment, kidnaping, and intentional and negligent infliction of emotional distress. He also appeals the district court's decision to limit damages to those imposed for his imprisonment in Mexico. He has dropped his allegations of mistreatment in Mexico and in the United States and the related causes of actions. Sosa appeals the judgment against him and assigns error to the district court's choice of federal common law of damages on the ATCA claim. The parties have stipulated to the dismissal of Alvarez's case against Garate.

Alvarez's ATCA claim

The district court found two independent grounds for sustaining jurisdiction and a claim for relief against Sosa for kidnaping under the ATCA. First, it held that state-sponsored abduction within the territory of another state without its consent is a violation of inter-

national law of sovereignty. Second, it held that state-sponsored abduction violates customary norms of international human rights law. We hold that Alvarez has standing to recover under the ATCA based only on the second ground.

A. Meaning of "Law of Nations"

The ATCA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1993). Sosa argues on appeal that only violations of *jus cogens* norms are actionable under the ATCA. *Jus cogens* norms are "rules of international law [that] are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them." Restatement (Third) of Foreign Relations Law § 102, cmt. k. However, Sosa's contention that there must be a *jus cogens* violation for the ATCA to apply finds no support in cited cases. ATCA cases have held that the norm must be "specific, universal, and obligatory." *In re Estate of Ferdinand E. Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998). This Court has held that a *jus cogens* violation satisfies the "specific, universal, and obligatory" standard, *Hilao* v. *Estate of Marcos*, 103 F.3d 789, 795 (9th Cir. 1996), but it has never held that a *jus cogens* violation is required to meet the standard. In *Martinez*, 141 F.3d at 1383, we stated that arbitrary arrest and detention were actionable under the ATCA, but did not consider whether

the "law of nations," the antecedent to customary international law, and *jus cogens* are related but distinct concepts. *See Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 714-16 (9th Cir. 1991). Therefore, we reject Sosa's argument that the ATCA requires a violation of a *jus cogens* norm and decline to decide whether arbitrary detention and kidnaping reach this heightened standard.

B. Mexican Sovereignty

Alvarez's claim that Sosa should be liable under the ATCA because his kidnaping violated Mexican territorial sovereignty fails. Alvarez lacks standing to sue for the violation. The Supreme Court has held that "the irreducible constitutional minimum of standing contains three elements:" (1) an "'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical,'" (2) a "causal connection between the injury and the conduct complained of the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court,'" and (3) the likeliness that the injury will be "redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal citations omitted). Alvarez's abduction does not satisfy the *Lujan* test, because Alvarez does not have a legally protected interest in Mexican sovereignty. As the Fifth Circuit has explained, "it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress." *United States* v. *Zabaneh*, 837 F.2d 1249, 1261 (5th Cir. 1988) (discussing an individual's lack of standing to sue for a violation of an international

treaty). Only Mexico has standing to object to encroachments on its territorial sovereignty.

C. Rights to Freedom of Movement, to Remain in One's Country, and Security in One's Person

Alvarez's kidnaping was nonetheless a violation of the "law of nations" because it violated customary international human rights law. The Supreme Court has stated that the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *United States* v. *Smith*, 5 Wheat. 153, 18 U.S. 153, 160-61, 5 L.Ed. 57 (1820); *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 880 (2nd Cir. 1980). *See also The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 44 L.Ed. 320 (1900) (stating "where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."). The Second Circuit also has used United Nations ("U.N.") declarations as evidence of the law of nations:

> These U.N. declarations are significant because they specify with great precision the obligations of member nations under the Charter . . . Accordingly, it has been observed that the Universal Declaration of Human Rights "no longer fits into the dichotomy of

> 'binding treaty'" against "non-binding pronouncement," but is rather an authoritative statement of the international community.

Filartiga, 630 F.2d at 883. Sosa cites the Restatement of Foreign Relations law for the proposition that no human rights instrument states explicitly that forcible abduction violates international human rights law. *See* Restatement (Third) of Foreign Relations Law of the United States § 432 n.1 (1987) ("none of the individual human rights conventions to date . . . provides that forcible abduction or irregular extradition is a violation of international human rights law"). Sosa fails to mention that the Restatement continues:

> However, Articles 3, 5, and 9 of the Universal Declaration of Human Rights, as well as Articles 7, 9 and 10 of the International Covenant on Civil and Political Rights might be invoked in support of such a view. In 1981 the Human Rights Committee established pursuant to Article 28 of the Covenant decided that the abduction of a Uruguayan refugee from Argentina by Uruguayan security officers constituted arbitrary arrest and detention in violation of Article 9(1). 36 U.N. GAOR, Supp. No. 40, at 176-84 (1981), *see also id.* at 185-89.

Id.

Although no international human rights instruments refers to transborder abduction specifically, various established international human rights norms, like the rights to freedom of movement, to remain in one's country, and to security in one's person, encompass it. Neither Sosa nor the Government challenges Alvarez's standing to claim a violation of his individual human and civil rights.

A number of international human rights instruments, which are evidence of customary international law, *see Siderman*, 965 F.2d at 716, assert the right of an individual to liberty and security. The American Convention on Human Rights (hereinafter "American Convention") provides that "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto" and that "[n]o one shall be subject to arbitrary arrest or imprisonment." O.A.S. Official Records, arts. 7(2)7(3), OEA/Ser.K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2 (1970) (signed but not ratified by the United States), reprinted in 9 I.L.M. 673, 676 (1970).

Alvarez's abduction occurred pursuant neither to the laws of Mexico nor to the laws of the United States. The Universal Declaration of Human Rights (hereinafter "Universal Declaration") provides that "[e]veryone has the right to freedom of movement and residence within the borders of each State." G.A. Res. 217A(III), 3 U.N. GAOR Supp. No. 16, U.N. Doc. A/810 (1948), art. 13(1). The International Covenant on Civil and Political Rights ("ICCPR") reiterates this guarantee. *See* ICCPR, art. 12, adopted Dec. 16, 1966, S. Treaty Doc. 95-2, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, entered into force for the United States Sept. 8, 1992). By kidnaping Alvarez and taking him to the United States, Sosa encroached on his rights to freedom of movement and residence.

Regional agreements also affirm the rights of freedom of movement and residence. The American Declaration of the Rights and Duties of Man, (hereinafter "American Declaration"), arts. 1, 8, OAS Doc. OEA/Ser. L/V/II.65, Doc. 6, pp. 19-25, May 2, 1948, asserts every

person's right to "liberty and security of his person, to 'fix his residence within the territory of the state of which he is a national, . . . and not to leave it except by his own will.'" The American Convention echoes the American Declaration's guarantees of the right to personal liberty and security, and the right not to be expelled from the territory of the state of one's nationality. American Convention, arts. 7, 22. *See also* Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 22, 1984, Europ. No. 117, 24 I.L.M. 435 (1985); African Charter on Human and Peoples' Rights, art. 12, June 27, 1981, 21 I.L.M. 58, 60. Here, Sosa and his fellow kidnapers forced Alvarez to leave Mexico against his will.

Thus, we agree with the district court that Alvarez's kidnaping violated his rights to freedom of movement, to remain in his country, and to security in his person, which are part of the "law of nations."

D. Arbitrary Detention

Alvarez's seizure also violated the international customary legal norm against arbitrary detention. This Circuit has found a "clear international prohibition against arbitrary arrest and detention" and has held that the ATCA reaches this conduct. *Martinez*, 141 F.3d at 1384. In *Martinez*, we held that the detention was not arbitrary because it was pursuant to a valid Mexican warrant. *See id.* Alvarez argues that, under *Martinez*, his arrest and detention were arbitrary because there was no Mexican warrant or any lawful authority for his arrest. We agree.

According to *Martinez*, "detention is arbitrary if 'it is not pursuant to law; it may be arbitrary also if it is

incompatible with the principles of justice or with the dignity of the human person.'" *Id.* (quoting Restatement of Foreign Relations law § 702 cmt. h). The district court held that the detention was arbitrary, because the United States warrant for Alvarez's arrest had no legal effect in Mexico, and the DEA had no legal authority for kidnaping him. A warrant issued by a United States court is valid only "within the jurisdiction of the United States." *See* Fed. R. Crim. P. 4(d)(2).

The *Martinez* court also noted: "[d]etention is arbitrary if 'it is not accompanied by notice of charges; if the person detained is not given early opportunity to communicate with family or to consult counsel; or is not brought to trial within a reasonable time.'" *Id.* Sosa argues that this statement encompasses the *Martinez* "test" for arbitrariness under international law. He does not explain how the "not pursuant to law" or "incompatible with the principles of justice or with the dignity of the human person" statements fit into the test. It would be more accurate to treat this second statement as an illustrative, not exhaustive, list of circumstances that make a detention arbitrary.

Sosa also maintains that Alvarez's detention was not prohibited by international law because it was not "prolonged." He argues that because the plaintiff in *Martinez* was detained illegally for 59 days, *see Martinez*, 141 F.3d at 1377, and Alvarez was held for less than twenty-four hours in Mexico, his detention was not actionable. However, the *Martinez* court set no time component in its arbitrary detention rule. The Court said simply: "there is a clear international prohibition against arbitrary arrest and detention," and cited Article 9 of the Universal Declaration and Article

9 of the ICCPR, neither of which include a temporal component. *Martinez*, 141 F.3d at 1384.

A kidnaping that ends in the death of a victim may have a duration of less than an hour. The effect on the victim has nothing to do with duration of the wrongful act. Accordingly, we hold that Alvarez's detention was arbitrary and, therefore, violated the "law of nations."

Substitution of the United States under 28 U.S.C. § 2679

The district court did not err in substituting the United States for the individual DEA defendants. Whether the district court erred in substituting the United States under 28 U.S.C. § 2679 is a matter of statutory interpretation and is therefore reviewed de novo. *See United States* v. *Juvenile Male (Kenneth C.)*, 241 F.3d 684, 686 (9th Cir. 2001).

Alvarez argues that the district court erred in its January 1995 order determining that Alvarez's claims under the ATCA were subject to substitution under the Federal Employees Liability Reform and Tort Compensation Act ("Liability Reform Act"), 28 U.S.C. § 2679 (1994). The Liability Reform Act provides that for most civil actions based on the wrongful conduct of federal employees acting within the scope of their employment, the only remedy is a FTCA lawsuit against the government itself. *See* 28 U.S.C. § 2679(b)(1) (1994). However, the exclusive remedy provision "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(B).

The district court held that an action under the ATCA was not exempt from the exclusive remedy provision of the Liability Reform Act. It reasoned that "it is international law, not the ATCA," that gives individuals fundamental rights. Therefore, a claim under the ATCA is based on a violation of international law, not of the ATCA itself.

This reading is consistent with the Supreme Court's reasoning in *United States* v. *Smith*, 499 U.S. 160, 111 S. Ct. 1180, 113 L. Ed. 2d 134 (1991). In *Smith*, the Court rejected the argument that a claim for medical malpractice was "authorized" by the Gonzalez Act and therefore fit the 28 U.S.C. § 2679(b)(2)(B) exception for violations of a statute. The court explained: "[n]othing in the Gonzalez Act imposes any obligations or duties of care upon military physicians. Consequently, a physician allegedly committing malpractice under state or foreign law does not 'violate' the Gonzalez Act." *Smith*, 499 U.S. at 174, 111 S. Ct. 1180.[2] The same can be said of the ATCA. The language of § 1350 creates no obligations or duties. Admittedly, the ATCA differs from the Gonzalez Act in that it creates a cause of action for violations of international law, whereas the Gonzalez Act limited the common law liability of doctors. *See In*

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[2] The relevant provision of the Gonzalez Act provides:

"The remedy against the United States provided by [the FTCA] for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician . . . of the armed forces . . . while acting within the scope of his duties or employment . . . shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician . . . whose act or omission gave rise to such action or proceeding."

10 U.S.C. § 1089(a) (1998).

re Estate of Marcos, 25 F.3d at 1475 (rejecting the argument that the ATCA is merely jurisdictional); *Abebe-Jira* v. *Negewo*, 72 F.3d 844, 848 (11th Cir. 1996); *Filartiga*, 630 F.2d at 885-86. Nonetheless, we find nothing in this distinction to cause us to deviate from the plain language of the statute. We therefore agree with the district court that Alvarez's claims under the ATCA were subject to substitution under the Liability Reform Act. Accordingly, Alvarez's exclusive remedy against the United States, in lieu of the DEA agents, is through the FTCA.

FTCA claims against the United States

The FTCA acts as a waiver of the United States' sovereign immunity for certain torts committed by its employees. 28 U.S.C. §§ 1346(b), 2674. The statute provides that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674 (1994). We review de novo the district court's determination of subject matter jurisdiction under the FTCA. *See Brady* v. *United States*, 211 F.3d 499, 502 (9th Cir.), cert. denied, 531 U.S. 1037, 121 S. Ct. 627, 148 L. Ed. 2d 536 (2000).

A. The "Foreign Activities" Exception

We agree with the district court that the "foreign activities" exception to the FTCA does not apply to this case, because Alvarez asserted a valid "headquarters claim." The FTCA exempts from its coverage "any claim arising in a foreign country." 28 U.S.C. § 2680(k) (1994). This exemption "is more than a choice of law provision: it delineates the scope of the United States' waiver of sovereign immunity." *Smith* v. *United States*, 507 U.S. 197, 200, 113 S. Ct. 1178, 122 L. Ed. 2d

548 (1993). However, creating the so-called "headquarters doctrine," the Supreme Court has held that the FTCA requires federal courts to look to the law of the place where the act took place, rather than the place where the act had its operative effect. *See Richards* v. *United States*, 369 U.S. 1, 10, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962).

The district court did not err in holding that Alvarez had stated a valid headquarters claim "with respect to his claim for false arrest/false imprisonment and intentional infliction of emotional distress from his seizure." Although the "operative effect" of Alvarez's kidnaping occurred in Mexico, all of the command decisions about his seizure and removal to the United States occurred in California. In *Leaf* v. *United States*, 588 F.2d 733, 735 (9th Cir. 1978), this Court held that a claim "arises, as that term is used in Sections 1346(b) and 2680(k), where the acts or omissions that proximately cause the loss take place."

Under California law, a person proximately causes a loss if his actions were a substantial factor in increasing the likelihood of the loss. *See Vickers* v. *United States*, 228 F.3d 944, 956 (9th Cir. 2000). The DEA defendants' conduct not only created the risk that Alvarez would be abducted, it was the cause in fact. According to the district court, the DEA officers:

> sought individuals who could work in Mexico to bring Plaintiff to the United States. Government employees gave explicit instructions on the person it [sic] wanted seized, the background of those who would seize him, and how those individuals should treat him during his trip to the United States. At a later stage, government employees instructed the

> arrest team where to fly the plane and obtained clearance for the plane to land. Moreover, as this Court explained in *Vickers*: It is well established under California law that the criminal or negligent acts of a third party do not break the causal link between the defendant's conduct and the alleged injuries, if the defendant's conduct created or increased the risk of such acts.

Vickers, 228 F.3d at 956. The involvement of Mexicans in physically seizing Alvarez did not break the chain of causation; they merely completed the chain. The DEA's planning assured that they would kidnap Alvarez.

As the district court noted, Alvarez's claims resemble those asserted in other cases in which courts have found valid headquarters claims and refused to apply the foreign claim exclusion. For example, in a case where the failure of the DEA and Customs to coordinate an operation led to the incarceration of a number of individuals in Honduras, the Eleventh Circuit held that, although the actual arrest and injury occurred in Honduras, the negligent act or omission occurred in the United States. *See Couzado* v. *United States*, 105 F.3d 1389, 1394-96 (11th Cir. 1997). *See also Sami* v. *United States*, 617 F.2d 755, 761-63 (D.C. Cir. 1979) (applying headquarters doctrine to claim of false arrest where the arrest took place in Germany because the instructions to make the arrest occurred in the United States); *Donahue* v. *United States Dep't of Justice*, 751 F. Supp. 45, 48-49 (S.D.N.Y. 1990) (allowing a headquarters claim "insofar as the act of negligence is alleged to have occurred in the United States"); *Glickman* v. *United States*, 626 F. Supp. 171, 174 (S.D.N.Y. 1985) (holding that the "foreign country" exception did not bar an

action filed by an American citizen who alleged that, while he was in Paris in 1 2, a Central Intelligence Agency agent surreptitiously drugged him with LSD where the complaint alleged that the program to administer drugs to unwitting persons originated in the United States).

Cominotto v. *United States*, 802 F.2d 1127 (9th Cir. 1986), a Ninth Circuit case in which the court refused to apply the headquarters doctrine, is distinguishable. In *Cominotto*, we held that the Federal Government's alleged negligence in failing to provide adequate guidance in connection with an undercover operation was not the proximate cause of the plaintiff's injuries and therefore did not fall under the headquarters doctrine. Cominotto, a DEA informant, violated Secret Service instructions by meeting suspects at night, entering their automobile, leaving Bangkok, and heading for a private meeting place. He was shot in the leg while "fleeing from a dangerous situation in which he had placed himself," and "was the sole and proximate cause of his injuries." *Id.* at 1130. As discussed above, nothing in Alvarez's case breaks the chain of causation. Sosa and his fellow abductors brought Alvarez to the United States pursuant to the plan of the United States government officials. The injury, Alvarez's false arrest, occurred as a direct and intended result of the DEA's plans. Thus, the headquarters doctrine applies.

The United States argues that the headquarters doctrine does not apply to intentional torts, but cites little support for this contention. The Government argues that "there can be no question that a court, when choosing between two states for the purposes of the FTCA, would always find that the intentional tort 'occurred' where the alleged tortious act was com-

mitted." The only case it cites is a Fifth Circuit case, *Landry* v. *A-Able Bonding, Inc.*, 75 F.3d 200, 205 n.7 (5th Cir. 1996), which applied Texas law to a claim of false imprisonment that took place in Texas pursuant to an arrest warrant issued in Louisiana. The *Landry* court's deciding a Texas state law claim of false imprisonment gives us little guidance in deciding a claim under the FTCA based on California law. We hold that the headquarters doctrine applies to intentional torts as well as cases of negligence and, therefore, applies to Alvarez's case.

B. False Arrest under the FTCA

1. Intentional Torts Exception

We agree with the district court that the intentional tort exception to the FTCA does not apply to Alvarez's case. The FTCA's waiver of sovereign immunity contains an exception for intentional torts, including false arrest, unless the intentional tort be committed by an "investigative or law enforcement officer." 28 U.S.C. § 2680(h) (1994). The statute defines an "investigative or law enforcement officer" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* The district court held that the intentional tort exception should not apply here because Alvarez's "claim contemplates liability for the actions of the law enforcement officers in the United States and those individuals should face liability for instructing others to do what the law enforcement individuals could not."

Although Sosa is not an officer of the United States and is not "empowered by law to execute searches, to seize evidence, or to make arrests for violations of

Federal law," he served as an agent or instrument for DEA agents who have these powers. *See* 21 U.S.C. § 878(a)(2), (3), and (4) (1999). *See also Van Schaick* v. *United States*, 586 F. Supp. 1023, 1032-33 (D.S.C. 1983) (holding that a county sheriff and a city police officer were investigative or law enforcement officers within the meaning of § 2680(h), because they were agents of the Assistant United States Attorney and the DEA agent, who directed them to make the arrest and secure the aircraft for the DEA). Indeed, as the district court explained, the policy reason for the "law enforcement officer" exception to the "intentional torts" exception to the FTCA—to "provid(e) a remedy against the Federal Government for innocent victims of Federal law enforcement abuses" applies here. Law enforcement officers cannot escape liability by recruiting civilians to do their dirty work.

As the district court noted, there appears to be no circuit law on point. The Eleventh Circuit has dealt with the opposite situation where non-enforcement individuals tricked members of law enforcement into an arrest. *See Metz* v. *United States*, 788 F.2d 1528, 1531-32 (11th Cir. 1986) (holding "that the provision permitting governmental liability on the basis of actions of law enforcement officers cannot be expanded to include governmental actors who procure law enforcement actions, but who are themselves not law enforcement officers").

Although there is no FTCA law on point, principles of Fourth Amendment law bolster our interpretation of the statute. The Fourth Amendment covers only government, not private, conduct, yet the Supreme Court has held that it prohibits unreasonable intrusions by private individuals who are acting as government

instruments or agents. *See Coolidge* v. *New Hampshire*, 403 U.S. 443, 487, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). The Ninth Circuit has adopted a test for determining whether "a private individual is acting as a governmental instrument or agent for Fourth Amendment purposes." *United States* v. *Reed*, 15 F.3d 928, 931 (9th Cir. 1994). A court must ask: "(1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further his own ends." *Id.* These factors, although intended for Fourth Amendment analysis, are useful in determining whether Sosa acted as an agent or instrumentality of the DEA law enforcement agents when he arrested and kidnaped Alvarez. The government admits that it knew of and acquiesced in the plan to kidnap Alvarez and bring him to the United States. Sosa performed the search to assist the DEA agents. Sosa had no individual interest in kidnaping Alvarez other than to curry favor with the DEA agents in the hopes that they would reward him. Therefore, because Sosa acted merely as an agent or instrument for "law enforcement officers," the United States has waived sovereign immunity.

2. Merits of False Arrest Claim

The FTCA states that the liability of the United States should be determined "in accordance with the law of the place where the [allegedly tortious] act or omission occurred." 28 U.S.C. § 1346(b) (1993). The parties agree that, assuming the foreign claims exclusion act does not apply, California law should apply here. "Under California law, the torts of false arrest and false imprisonment are not separate torts, as false arrest is 'but one way of committing a false imprison-

ment.'" *Watts* v. *County of Sacramento*, 256 F.3d 886 (9th Cir. 2001) (quoting *Asgari* v. *City of Los Angeles*, 15 Cal. 4th 744, 63 Cal. Rptr. 2d 842, 937 P.2d 273, 278 n. 3 (1997)). "A cause of action for false imprisonment based on unlawful arrest will lie where there was an arrest without process followed by imprisonment." *Watts*, 256 F.3d 886 (citing *City of Newport Beach* v. *Sasse*, 9 Cal. App. 3d 803, 88 Cal. Rptr. 476, 480 (1970); *Dragna* v. *White*, 45 Cal. 2d 469, 289 P.2d 428 (Cal. 1955)). False imprisonment "consists of the nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short." *Scofield* v. *Critical Air Medicine, Inc.*, 45 Cal. App. 4th 990, 1000, 52 Cal. Rptr. 2d 915 (1996).

a. Authorization for arrest under federal law

Federal law did not give the DEA agents or Sosa "lawful privilege" to arrest Alvarez in Mexico. To determine whether a federal officer had lawful authority to carry out an arrest, a California court would first ask whether the arrest was authorized under federal law. *See Rhoden* v. *United States*, 55 F.3d 428, 431 (9th Cir. 1995). Because Sosa acted as an agent or instrumentality for federal officers and had no independent authority for arresting Alvarez, we must ask whether the federal officers would have been authorized to arrest Alvarez.

The statute authorizing DEA enforcement neither expressly confers extraterritorial authority to the DEA nor expressly restricts its authority to the United States. We have held that agents of the Immigration and Naturalization Service ("INS") have the authority to conduct law enforcement activity outside the United States, even when Congress has not explicitly and directly conferred it on them, because Congress "has

delegated broad enforcement powers to the Attorney General, who in turn has delegated those powers to the Commissioner of the INS, who in turn is authorized to delegate those powers to INS agents." *See United States* v. *Chen*, 2 F.3d 330, 333 (9th Cir. 1993).

The Government argues that the DEA, like the INS, has extraterritorial authority. Indeed, Congress also drew the DEA's powers broadly. *See, e.g.*, 21 U.S.C. § 878(a)(3) (1999) (authorizing a DEA agent to "make arrests without warrant . . . for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony"); 21 U.S.C. § 878(a)(5) (authorizing the DEA to "perform such other law enforcement duties as the Attorney General may designate").

In other statutes where extraterritorial application was not explicit, courts have found it to be implied. *See, e.g., United States* v. *Cotten*, 471 F.2d 744, 751 (9th Cir. 1973) (holding that "when a citizen of this country, while without the territorial jurisdiction of the United States, violates [a federal statute prohibiting the theft of government property], he is amenable to resulting criminal prosecution in United States District Courts"). The Government contends that substantive criminal statutes also indicate that Congress intended the DEA's authority not to be limited to the United States. *See, eg.*, 18 U.S.C. § 1201(e)(1) (2000) (giving the United States jurisdiction over kidnaper of internationally protected federal representatives, officers, or employees outside the United States).

As the Government also notes, other statutes appear to envision foreign law enforcement activity. Congress has authorized the military to supply equipment and

assistance to federal law enforcement officers in a variety of extraterritorial operations, for example "the rendition of a suspected terrorist from a foreign country to the United States to stand trial." 10 U.S.C. § 374(b)(1)(D) (2001 Supp.). *See also* 18 U.S.C. §§ 351(g) (2000) (authorizing the military to assist in investigating kidnapings or assassinations of Congressional, Cabinet, and Supreme Court members) and 351(i) (2000) (providing for extraterritorial jurisdiction over the kidnaping and assassinations).

The Government contends that "in order for the DEA and other federal law enforcement agencies to fully execute [criminal] statutes, its arrest authority must have an equivalent extraterritorial scope." The Office of Legal Counsel used the same reasoning in an unpublished opinion, which discussed the authority of the Federal Bureau of Investigation to override international law to conduct extraterritorial law enforcement activities. *See* 13 Op. Off. Legal Counsel 163 (1989).

If this assertion is an accurate statement of United States law, then it reinforces the critics of American imperialism in the international community. An alternative interpretation would suppose that Congress intended for federal law enforcement officers to obtain lawful authority, which, for example, here might be a Mexican warrant, from the state in which they sought to arrest someone. *See* 10 U.S.C. § 374(b)(1)(D) (2001 Supp.) (providing that United States military assistance in rendering suspected terrorists to stand trial be "in accordance with other applicable law").

This reading of the DEA's authority complies with the United States' obligations under the 1988 United Nations Convention Against Illicit Traffic in Narcotic

Drugs and Psychotropic Substances, which provides that:

> 2. Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
>
> 3. A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are Exclusively reserved for the authorities of that other Party by its domestic law.

Art. 2(2)-(3), S. Treaty Doc. No. 4, 101st Cong., 1st Sess. 7, entered into force for the United States Nov. 11, 1990, reprinted in 28 I.L.M. 497 (1989). Therefore, we hold that there was no lawful federal authority for Alvarez's kidnaping.

b. Authorization for arrest under California law

Nor did the officers or Sosa have lawful authority under California law to arrest Alvarez in Mexico. The district court held that even if the DEA did not have statutory authority to make an arrest on foreign soil, Alvarez's apprehension in Mexico was still not a "false arrest" under California law because it was something akin to a citizen's arrest. *See Padilla* v. *Meese*, 184 Cal. App. 3d 1022, 229 Cal. Rptr. 310, 316 (1986) (holding that "[w]here an officer acts outside the scope of his statutory authority an arrest is not necessarily rendered unlawful" because it may be a lawful citizen's arrest).

However, the district court erred in turning to the law of citizen's arrests. We have held that "the proper

source for determining the government's liability [for false imprisonment by IRS officers under the FTCA] is not the law of citizen's arrests, but rather the law governing arrests pursuant to warrants." *Arnsberg* v. *United States*, 757 F.2d 971, 979 (9th Cir. 1985). In *Arnsberg*, the court reasoned that IRS agents had "law enforcement obligations, such as the duty to execute warrants, which private citizens lack," which made "the law of citizen arrests an inappropriate instrument for determining FTCA liability." *Id.* at 979. DEA agents Gruden, Lawn, Waters, and Berrellez, also had law enforcement obligations, including the duty to execute warrants, which private citizens lack. *See* 21 U.S.C. § 878(2) (1999).

Ultimately, the *Arnsberg* court rejected the plaintiff's claim of false imprisonment under the FTCA because the agents, having attempted but failed to effect personal service and having followed the advice of a United States Attorney, "acted nearly perfectly," made only a "relatively minor and a relatively technical" error, and acted properly under the general common law. *Arnsberg*, 757 F.2d at 979. The officers here did not act "nearly perfectly." They arranged the kidnaping of Alvarez outside of the jurisdiction of their United States warrant. The warrant did not suffer from "relatively minor" or "relatively technical" defects. While valid on its face, it simply had no effect in Mexico. The invalidity of the warrant for the purposes of Alvarez's arrest meant that the DEA agents did not act properly under the general common law. As the *Arnsberg* court noted, according to the Restatement (Second) of Torts, §§ 122-24 (1965), "an arrest is privileged if it is made pursuant to a warrant which is regular in form and which reasonably appears to have

been issued by a court with jurisdiction." *Id.* Here, the Los Angeles court was of competent jurisdiction to issue a warrant for the arrest of an individual in the United States, but had no jurisdiction to issue a warrant for an arrest in Mexico. *See* Fed. R. Crim. P. 4(d)(2).

C. California Statutory Immunities

To the extent that the district court's opinion can be read to suggest that the DEA defendants were immune from a suit under the FTCA due to California statutory immunities, it is incorrect.[3] A number of cases have rejected attempts to limit FTCA liability based on state

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[3] It appears that the district court did not hold that the DEA officers were immune. It noted that the parties were confusing matters by discussing immunity, because the defendants were not arguing that they were immune under state law, but rather that the arrest was not unlawful under state law. Despite arguing that immunity was not at issue, the district court suggested that it believed the officers could be immune from FTCA liability under state law. The court described *Ting* v. *United States*, 927 F.2d 1504, 1514 (9th Cir. 1991) and *Arnsberg* v. *United States*, 757 F.2d 971 (9th Cir. 1985) as cases in which the Ninth Circuit had applied state immunity principles to a claim of false arrest under the FTCA. The district court also declared that *Ting* "directly govern[ed]" Alvarez's case. As Alvarez notes, the *Ting* court did not decide whether state immunities under Cal. Civ. Cod § 43.55 could bar FTCA claims. Instead, it based its holding on the absence of malice, a requirement for the claim of false arrest. *See Ting* 927 F.2d at 1514. Nor does *Arnsberg* stand for the proposition that state immunities could bar an FTCA claim. In *Arnsberg*, the Court held that IRS agents who consulted with an assistant United States Attorney before they sought the warrant and could reasonably rely on the attorney's belief that the arrest was legal were insulated by qualified immunity under federal law in a *Bivens* action for executing invalid material witness arrest warrant, but that state citizen's arrest law did not apply. *Arnsberg*, 757 F.2d at 979, 981.

immunities. In *United States* v. *Muniz*, the Supreme Court rejected the application of state immunity for jailers in an FTCA suit. *See United States* v. *Muniz*, 374 U.S. 150, 164-66, 83 S. Ct. 1850, 10 L. Ed. 2d 805 (1963). The Court explained: "we think it improper to limit suits by federal prisoners because of restrictive state rules of immunity." *Id.* at 164-65, 83 S. Ct. 1850. *See also Indian Towing Co.* v. *United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L.Ed. 48 (1955). Similarly, "[t]he Ninth Circuit has refused to grant immunity to federal officers based on state statutes that confer public entity immunity for the conduct of government employees in an action against the United States under the FTCA." *Stuart* v. *United States*, 23 F.3d 1483, 1488 (9th Cir. 1994). In *Stuart*, we held that a California statute that gave public entity immunity for peace officers in vehicular pursuits did not provide immunity to the United States in action under FTCA. *See id.* Because state privileges do not bar holding federal officers liable under the FTCA, the Court need not decide whether the arrest was privileged under California law.

Therefore, we hold that the arrest of Alvarez was a "false arrest," for which the United States is liable under the FTCA.

Choice of Law for ATCA Damages

The district court did not err in choosing to apply the federal common law rather than Mexican law in determining the amount of damages to award Alvarez for his ATCA claim against Sosa. This Court reviews de novo the district court's decision concerning the appropriate choice of law. *Abogados* v. *AT & T, Inc.*, 223 F.3d 932, 934 (9th Cir. 2000). The district court applied federal common law because it concluded that applying Mexican law, which would limit the amount of

damages and prevent the consideration of punitive damages, would "inhibit the appropriate enforcement of the applicable international law or conflict with the public policy of the United States." It explained that "the use of federal common law remedies, including the possibility of punitive damages, best serve[d] the end of the Alien Tort Claims Act."

Sosa maintains that the district court should have used Mexican law because the injury occurred in Mexico. Federal common law determines the choice of law rule, because the court heard the case under its federal question jurisdiction. *See Schoenberg* v. *Exportadora de Sal, S.A.*, 930 F.2d 777, 782 (9th Cir. 1991). Federal common law follows the Restatement (Second) of Conflict of Laws ("Restatement of Conflicts"). *See id.* Sosa cites the Restatement provision on personal injuries for his claim that "there is a presumption that the law of the place where the injury occurs applies." *See* Restatement of Conflicts § 146. However, the Restatement does not classify this case as a personal injury case. Comment b to § 146 explains that

> A personal injury may involve either physical harm or mental disturbance, such as fright and shock, resulting from physical harm or from threatened physical harm or other injury to oneself or to another. On the other hand, injuries to a person's reputation or the violation of a person's right of privacy are not "personal injuries" in the sense here used.

Id. (citations and internal quotations omitted). Alvarez's claim is not based on the assaultive physical or mental harm suffered, but rather on the deprivation of

his rights to be free from arbitrary arrest, to liberty, to remain in his country, and to freedom of movement.

Thus, the general principle on conflict of laws for tort claims is more useful here. Under the General Principle for torts announced in the Restatement of Conflicts § 145;

> The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

The Restatement of Conflicts § 6 provides a list of factors to be used to determine the appropriate rule of law, which include:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

Restatement of Conflicts § 6.

Applying the § 6 factors to this case favors the choice of federal common law. The needs of the international system are too complex to dictate clearly the choice of either Mexican or federal common law. However, it is difficult to deny that encouraging states and individuals to comply with international law is beneficial and that damages for torts committed in violation of international law will encourage compliance. The United States, in enacting the ATCA, has expressed a policy to provide a cause of action and a federal forum to fashion remedies for violations of international law. *See Abebe-Jira*, 72 F.3d at 848. The United States has an interest in other states' respecting the human rights of its citizens. Mexico has an interest in the United States doing the same. Moreover, "[s]ince it is the plaintiff[ ] and not the defendants who [is] the Mexican resident[ ] in this case, Mexico has no interest in applying its limitation of damages—Mexico has no defendant residents to protect and has no interest in denying full recovery to its residents injured by nonMexican [sic] defendants." *Hurtado* v. *Superior Court of Sacramento County*, 11 Cal. 3d 574, 114 Cal. Rptr. 106, 522 P.2d 666 (1974). Because this is an action in tort, not contract, the justified expectations factor does not apply. *See Lange* v. *Penn. Mut. Life Ins. Co.*, 843 F.2d 1175, 1180-81 (9th Cir. 1988).

The remaining § 6 factors also favor the application of federal common law. The basic policies underlying international human rights law would be enhanced by selecting the stronger federal common law of damages. Potential violators of human rights norms should know that they will pay for their actions. Choosing federal common law enhances the certainty, predictability, and uniformity of damage awards under the ATCA, because

the remedy will not depend on the laws of the country in which a violation occurred. Finally, because United States courts have more experience in applying federal common law than Mexican law, it will be easier for them to determine and apply the familiar law. Applying Mexican law, the court would face both language barriers and the need to become familiar with a civil code system of law.

Caveat: the Restatement § 145 also provides "contacts to be taken into account in applying the principles of § 6 . . ." It is less clear which laws these "contacts" favor. These contacts include:

> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.

Restatement of Conflicts § 145(2). The kidnaping occurred in Mexico. However, an important part of the conduct that caused the injury, the planning of the DEA, occurred in the United States. Alvarez and Sosa are both Mexican. Alvarez lives and works in Mexico. Although Sosa lived in Mexico before the kidnaping, he now lives in the United States. Nonetheless, we believe that the relationship between the parties is centered in the United States. Sosa abducted Alvarez pursuant to the agenda of United States DEA agents. The DEA agents wanted Alvarez apprehended in order

to prosecute him in the United States for his alleged participation in the killing and torture of an American DEA agent in Mexico. In sum, although a case can be made for applying Mexican law, the district court did not err in choosing to apply federal common law.

Scope of damages

We agree with the district court that Alvarez cannot recover damages for his entire imprisonment in the United States. Whether Alvarez can recover damages for the duration of his imprisonment in the United States is a question of law, and, therefore, is reviewed de novo. *See United States* v. *Stephens*, 237 F.3d 1031, 1033 (9th Cir. 2001). As noted, in determining the scope of damages for Alvarez's ATCA claim, we look to federal law. By contrast, for Alvarez's FTCA claim, "the extent of the United States' liability under the FTCA is generally determined by reference to state law." *Molzof* v. *United States*, 502 U.S. 301, 305, 112 S. Ct. 711, 116 L. Ed. 2d 731 (1992).

Although we have found neither federal nor state law cases that have dealt with the question whether an individual who has been kidnaped and brought to the United States for a criminal prosecution can recover damages for the duration of his imprisonment in the United States, we agree with the district court that "the lawful arrest warrant and indictment broke the chain of causation from [Sosa]'s actions to [Alvarez]'s continuing injuries."

As the district court explained, the rationale of federal cases involving false arrest and imprisonment is useful here despite the uniqueness of the facts. With respect to a § 1983 action based on false arrest, this Court has stated:

> Filing of a criminal complaint immunizes investigating officers such as the appellants from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time.

Smiddy v. *Varney*, 665 F.2d 261, 266-67 (9th Cir. 1981). In Alvarez's case, the DEA had an independent and lawful basis for Alvarez's arrest once he fell within the jurisdiction of the warrant and felony indictment.

Similarly, California courts have cut off liability for false arrest at the date of arraignment, *see County of Los Angeles* v. *Superior Court*, 78 Cal. App. 4th 212, 92 Cal. Rptr. 2d 668, 677 n.4. (2000), but the reasoning for the cut-off differs from that of federal law, and Alvarez contends that it does not apply to this case. In *Asgari* v. *City of Los Angeles*, 15 Cal. 4th 744, 757, 63 Cal. Rptr. 2d 842, 937 P.2d 273 (1997), the California Supreme Court held that Government Code § 821.6 precluded a plaintiff in a false arrest action from recovering for injuries attributable to the period of incarceration after his or her arraignment on criminal charges.

According to Alvarez, *Asgari* merely holds that Cal. Gov. Code § 821.6, which provides public employees with immunity from malicious prosecution actions, immunizes public employees from damages for false imprisonment from the time of lawful arraignment on.[4] As Alvarez notes, Sosa is not a public employee under § 821.6, because he is not an employee of a California state entity. *See Randle* v. *City and County of San*

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[4] The *Asgari* court also relied on Cal. Gov. Code § 820.4, which immunizes "public employees" from actions based on false arrest.

Francisco, 186 Cal. App. 3d 449, 456, n.6, 230 Cal. Rptr. 901, (1986) (noting that "The Government Code defines 'public employee' as 'an employee of a public entity,' (Section 811.4) and 'public entity' as including 'the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State.' (Section 811.2)"). Alvarez maintains that the rule of *Gill* v. *Epstein*, 62 Cal. 2d 611, 617-18, 44 Cal. Rptr. 45, 401 P.2d 397 (1965), that imprisonment proximately caused by false arrest, including imprisonment after a lawful arraignment, is compensable as a "natural consequence of a false arrest" has survived *Asgari* and controls his case.

We agree with the district court that *Asgari* overruled *Gill*. The *Asgari* court's discussion of parallels to a New York case based on causation indicates that it meant for its holding to be read broadly. *Asgari* stated that its holding was consistent with *Broughton* v. *State*. *Broughton's* limitation on liability was based not on state immunity principles, but rather on the grounds that "an action for false imprisonment redresses the violation of plaintiff's freedom of movement and not freedom from unjustifiable litigation, therefore[,] attorney's fees are not proximate after arraignment or indictment and hence not recoverable." *Broughton* v. *State*, 37 N.Y. 2d 451, 373 N.Y.S. 2d 87, 335 N.E.2d 310, 316 (1975); *see also County of Los Angeles* v. *Superior Court*, 78 Cal. App. 4th 212, 92 Cal. Rptr. 2d 668, 675 (2000) (explaining that *Asgari* overruled *Gill*). Therefore, we hold that *Asgari* is not limited to public employees. *Asgari* applies here, and Alvarez's damages are limited to his time in Mexico.

Accordingly, we AFFIRM the district court's judgment with respect to Sosa's liability under the ATCA, the substitution of the United States for the individual DEA defendants, the choice of federal common law to determine damages, and the limitation of damages to Alvarez's time in captivity in Mexico. However, we REVERSE the district court's dismissal of Alvarez's FTCA claims against the United States and REMAND the case for a determination of the United States' liability. The dismissal of Alvarez's claims against Garate-Bustamente is GRANTED. No party to recover costs on appeal.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 93-4072 SVW (SHx)

HUMBERTO ALVAREZ-MACHAIN, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Filed: Mar. 18, 1999

ORDER

I. Introduction

The facts of this case are well known to the parties and the courts of the United States and this Court will not belabor them here. In short, in April 1990, individuals acting on behalf of the United States Drug Enforcement Administration seized Plaintiff Alvarez from Guadalajara, Mexico, and brought him to El Paso, Texas, because of Plaintiff's alleged role in the torture and death of DEA Agent Enrique Camarena. The United States had already indicted Plaintiff in Los Angeles, and obtained a warrant for his arrest, based on his alleged role in Agent Camarena's death. After resolving the jurisdictional issue, *United States* v. *Caro-Quintero*, 745 F. Supp. 599, 601 (C.D. Cal. 1990),

aff'd sub nom United States v. *Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 665 (1992), the case proceeded to trial and the district court granted Plaintiff's motion for acquittal.

On July 9, 1993, Plaintiff filed the instant suit and alleged eleven causes of action against the United States and various individual defendants. Defendants moved to dismiss the complaint. Judge Davies, the previous judge handling the matter, granted the motion in part and denied the motion in part. *See* Memorandum Opinion Regarding the Defendant's Motions to Dismiss and to Substitute, filed January 20, 1995. The Ninth Circuit affirmed in part, reversed in part, and remanded the matter back to the district court. *Alvarez-Machain* v. *United States*, 107 F.3d 696 (9th Cir. 1997). This Court received the case after Judge Davies retired from the bench. The parties then filed a number of motions. Plaintiff filed a motion for partial summary judgment against the United States and a motion for partial summary judgment against Defendant Sosa. Defendant Sosa and the United States moved to substitute the United States for Defendant Sosa pursuant to 28 U.S.C. § 2679 ("Westfall Act"). Finally, Defendant Sosa, Defendant United States, Defendant Garate-Bustamante, and Defendants Berrellez, Gruden, Lawn, and Waters, all filed motions for summary judgment. The Court held a hearing in this matter on March 1, 1999.

II. Defendant Sosa's Motion for Substitution

Defendant Sosa argues that the Court should substitute the United States in his place with respect to Plaintiff's non-constitutional claims pursuant to the Federal Employees Liability Reform and Tort Com-

pensation Act of 1988 (commonly known as the Westfall Act). 28 U.S.C. § 2679.[1]

The Westfall Act allows the Attorney General to certify an individual's status as an employee acting within the scope of his or her employment and thereby substitute the United States in his or her place as a defendant, except with respect to constitutional claims or claims with respect to the violation of certain federal statutes. 28 U.S.C. § 2679(b). In this case, Helene Goldberg, Director of the Torts Branch of the Civil Division of the Department of Justice, has on two occasions[2] certified that Defendant Sosa acted as an employee within the scope of his authority at all times relevant to this suit. *See* Sosa's Motion to Substitute, Exh. A.; United States' Motion to Substitute, Exh. A.

Certification by the Attorney General settles the issue unless challenged. *Billings* v. *United States*, 57 F.3d 797, 800 (9th Cir. 1995). Plaintiff challenges the certification of the Attorney General and argues that Sosa was not an "employee" of the United States, but merely an independent contractor. Plaintiff bears the burden of disproving the Attorney General's certifi-

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[1] Judge Davies' past Order substituted the United States for Defendants Berrellez, Waters, Gruden, and Lawn. Plaintiff subsequently stipulated to the substitution of the United States for Defendant Garate-Bustamante. Thus, of the individual Defendants, only Defendant Sosa remains in this regard.

[2] Judge Davies initially denied Sosa's motion for certification without prejudice so that Plaintiff could undertake discovery into the matter. The Attorney General, through Ms. Goldberg, certified Sosa a second time on February 3, 1999, after the close of discovery. The Court notes that while Ms. Goldberg signed her certification as "2/3/98," it is clear from the text and the time of submission that she meant "2/3/99" and simply made a mistake in writing the year.

cation and the determination of "employee" status relies on federal law. *Id.* *See also Green* v. *Hall*, 8 F.3d 695, 698 (9th Cir. 1993).

The Federal Tort Claims Act defines employees of the government as "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." *United States* v. *Orleans*, 425 U.S. 807 (1976); *Logue* v. *United States*, 412 U.S. 521 (1973). The distinction between an employee and an independent contractor depends on "the existence of federal authority to control and supervise the 'detailed physical performance' and 'day-to-day operations' of the contractor, and not whether the agent must comply with federal standards and regulations." *Ducey* v. *United States*, 713 F.2d 504, 516 (9th Cir. 1983) (quoting *Orleans*, 425 U.S. at 814-15). *See also Will* v. *United States*, 60 F.3d 656, 659 (9th Cir. 1995); *Carrillo* v. *United States*, 5 F.3d 1302, 1304 (9th Cir. 1993).

In *Logue*, the Supreme Court explained the term "employee" by examining the definition of "servant" in the Second Restatement of Agency, section 220. 412 U.S. at 527. The Restatement lists the following factors:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupa-

> tion; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

The Ninth Circuit has adopted this approach, but has not considered a situation similar to Defendant Sosa's. The so-called "informant" cases provide the closest analog. In *Slagle* v. *United States*, 612 F.2d 1157, 1159-61 (9th Cir. 1980), the court agreed with the district court's conclusion that the government informant at issue was not an employee. The court adopted the lower court's reasoning that the government had no "right of control nor actual control" of the informant. *Id.* at 1161. In *Slagle*, the informant at issue volunteered to work for the government pursuant to very lax oversight in which the informant would create his own assignments. In the event which led to liability in the case, the informant carried a gun in violation of agency policy and set out on a trip to gather information without receiving approval from anyone in the agency.

By contrast, in *Leaf* v. *United States*, 661 F.2d 740 (9th Cir. 1981), the court approved the decision of the district court which considered an informant an agent of the government.[3] Bean, the informant in the case,

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[3] While the opinion in *Leaf* did not explicitly classify the informant as an "employee," the opinion did call the informant an agent and then proceeded to consider other defenses under the Federal

volunteered to perform undercover operations on behalf of the government. The court explained that Bean undertook the actions at issue with "full knowledge and approval of his supervisors." *Id.* at 741.

The Ninth Circuit attempted to harmonize these two cases in *Wang* v. *Horio*, 45 F.3d 1362 (9th Cir. 1995). In *Wang*, the court stated that "[g]enerally an informant is not a government employee. Sometimes someone 'who is not the run-of-the-mill informant' may be found to be one." *Id.* at 1364 (citations omitted). The district court in *Wang* had initially deemed the informant an employee but the Ninth Circuit reversed and remanded so that the district court could hold a more complete evidentiary hearing. On remand, the district court again found employee status and then ordered the United States, which had resisted certification, to pay fees to the informant. That fee award served as the basis of the appeal cited above, 45 F.3d 1362, and the Ninth Circuit only decided to reverse the award by concluding that the government's position that the informant was not an employee was substantially justified. The district court's decision, which remains intact on this point, held that the informant was an employee despite the fact that the IRS repeatedly told him he was not an employee, he did not receive any compensation, he could have withdrawn at any time, and, in fact he had a full time job with the individuals against whom he provided information.

Plaintiff's evidence demonstrates that Defendant Sosa did not serve as an employee of the government in

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Tort Claims Act. Thus, despite some imprecision, the court's finding does apply to the interpretation of "employee."

the actions involved in this case.[4] Plaintiff explains that Defendant Berrellez asked Defendant Garate-Bustamante, a salaried DEA operative, to arrange for Plaintiff's removal from Mexico. Garate, in turn, communicated with a man named Ignacio Barragan, now deceased, who was a former member of Mexican law enforcement. Garate enlisted Barragan to hire individuals to seize Plaintiff and transport him to the United States. The record clearly demostrates that the DEA, through Berrellez and Garate, instructed Barragan to (1) hire Mexican law enforcement personnel to perform the task and (2) command those individuals not to harm Plaintiff on his trip to the United States. Garate Depo. at 158, 207-08; Berrellez Depo. at 102-04. In addition, the DEA only planned to pay for the operation upon Plaintiff's arrival in El Paso unharmed. Garate Depo. at 173; Berrellez Depo. at 104. Berrellez and Garate learned after the fact that Defendant Sosa was one of the individuals hired by Barragan who participated in Plaintiff's seizure and trip to the United States. Berrellez Depo. at 97-98; Garate Depo. at 205-206.

Plaintiff submits that this chain of events shows that the government did not have the "authority to control and supervise the 'detailed physical performance' and

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[4] Sosa argued that the Court could not consider Plaintiff's arguments that Sosa was not an employee of the government due to the law of the case and Plaintiff's own pleadings. The Court disagrees. No court in the history of this litigation has found that Sosa was an employee of the government. Only judge Davies faced the question; he denied Sosa's motion for substitution on the state of the record at the time and rejected the same arguments for estoppel. Order at 32-33. Both sides describe Sosa's relationship in different ways at different times. Nevertheless, Sosa could be an "agent" of the government without being an "employee."

'day-to-day operations'" of Sosa or the "arrest team" before or during the operation in Mexico. Plaintiff contends that while Plaintiff bears the burden of disproving Sosa's employment, the record remains bereft of any evidence of the authority to control the operation. The Court agrees. The record shows that Garate maintained frequent contact with Barragan and that Berrellez spoke directly with Barragan on the phone on four or five occasions. Garate twice traveled to Mexico to meet with Barragan. Nevertheless, despite the government's degree of control over Barragan,[5] Plaintiff offers convincing evidence that no government employee had any degree of control or authority to control the actions of Sosa.[6]

Neither Garate nor Berrellez knew any of the details of the plan to seize Plaintiff in Mexico. The record reflects that Barragan called Garate on April 2, 1990. Barrgan informed Garate that the team had custody of Plaintiff. Plaintiff's counsel asked Garate in Garate's deposition, "[p]rior to the call, did you have any infor-

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[5] Due to Barragan's death, the Court has not had the opportunity to consider the employment status of Barragan. The Court has serious questions about whether it could classify Barragan as an employee for purposes of the Westfall Act. Nevertheless, the parties have not urged the Court to decide that question and the record reveals little about what degree of control Barragan exercised over the operation in Mexico. Thus the Court will examine the authority or actual control of the government employees in this case: Garate and Berrellez.

[6] Sosa argues that under the approach of *B & A Marine Co.* v. *American Foreign Shipping Co.*, 23 F.3d 709, 713 (2d Cir. 1994), the government can exercise its control directly or through an intermediary. The Court need not reach that issue because no individual in the government's chain of authority above Sosa had the authority to control Sosa's actions.

mation that the operation was going to take place on April 2nd?" Garate answered "[n]o sir. The operation —he was already on his way. Whenever it happens, happens." Garate Depo. at 214. Berrellez also admitted that he did not know any of the plan surrounding the details of the arrest. Berrellez Depo. at 147. Garate and Berrellez did not have any further contact with the arrest team until after the plane touched down in El Paso and they did not even know the names of the individuals until after the fact. Garate Depo. at 206, 212; Berrellez Depo. at 117. As Plaintiff aptly describes the issue in his brief, "Garate simply put the entire operation in Barragan's hands." Plaintiff's Opposition to Defendant Sosa's Motion for Substitution at 6. The record demonstrates an utter lack of actual control or even the right to control the detailed physical performance of Sosa's actions.

In addition, while the Court finds the factors in the Second Restatement of Agency difficult to apply in the informant setting, the listed factors which might apply also suggest that Sosa acted as an independent contractor. The Court has already discussed the most critical factor, extent of control, above. The United States did not supply any of the instrumentalities or tools for the operation. In fact, Garate stated in his deposition that he told Barragan at one point that "it had to be a strictly Mexican operation. We cannot even give them chewing gum. They have to come up with everything." Garate Depo. at 188. In addition, Sosa performed a one time service which took little time and the United States planned to compensate him for the job as a whole, not pay by the hour.[7] The parties could not have

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[7] Sosa argues that the statutory definition preempts these two provisions of the Restatement. Section 2671 provides that one

believed that they were creating a master and servant relationship. While Sosa hoped that the DEA would pay him and provide a recommendation for his future employment, Sosa never communicated with anyone in the United States government and the government did not even know Sosa's identity until well after the fact.

The remaining factors do not seem to apply in this setting: the Court cannot conclude whether or not Sosa was "engaged in a distinct occupation or business," whether the work "is usually done under the direction of the employer or by a specialist without supervision," the skill required, or whether or not the principal "is or is not in business."[8]

In short, the DEA sought individuals who could work in Mexico to bring Plaintiff to the United States. Government employees gave explicit instructions on

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may serve as an employee "temporarily or permanently in the service of the United States, whether with or without compensation." The Court agrees that this language allows a court to find an individual an employee of the government even if that person acted for a short period of time without compensation. However, the statute does not suggest that those factors do not relate to the determination of employee status. Sosa cites no authority for that proposition, nor does the Court know of any such authority. The Court feels that the statute merely applies the Restatement in this context: length of employment and compensation are factors, but not decisive factors, in the determination of employee status.

[8] The Court suspects that this sort of covert operation is not a "distinct business," that it is "often done by a specialist without supervision," that it requires some skill, that while arrests are part of the regular business of the DEA, covert arrests in another country are not, and that the DEA is not "in business" as defined in the Restatement. Nonetheless, the Court finds these particular categories more relevant to the typical employment context and the record does not contain enough information for the Court to decide these issues.

the person it wanted seized, the background of those who would seize him, and how those individuals should treat him during his trip to the United States. At a later stage, government employees instructed the arrest team where to fly the plane and obtained clearance for the plane to land. Beyond that, the government turned the operation over to the team of individuals and had no idea how or when the arrest would occur, or even the identities of those who made the arrest. The government did not control the operation, nor did it assert any right to do so. The government wanted the fruits of the plan (Plaintiff's arrest in the United States) but did not involve itself, in any meaningful way, in the plan itself. For this reason, the Court finds that under the Ninth Circuit's "control" test, or even the broader test of *Logue* and the Second Restatement of Agency, Defendant Sosa was not an employee. Accordingly, the Court DENIES the motion to substitute by Defendant Sosa and Defendant United States.

III. Defendant Bellerez, Gruden, Lawn, and Waters' Motion for Summary Judgment and Defendant Garate-Bustamante's Motion for Summary Judgment

Plaintiff asserts *Bivens* claims against all of these individual Defendants. At the outset of the case, Plaintiff based his claims on the alleged violation of the Fourth, Fifth, and Eighth Amendments, for Defendants' actions during the entire range of the operation: from Plaintiff's arrest in Mexico through his detention in the United States. Judge Davies dismissed the *Bivens* claims arising out of conduct in Mexico. He reasoned that the Eighth Amendment did not apply to any of the conduct at issue and that the Fourth and

Fifth Amendment did not apply extraterritorially. Order at 26, 40-42. The Ninth Circuit affirmed, although on a different ground. *Alvarez*, 107 F.3d at 702. The Ninth Circuit relied on its own finding, which it made on remand from the Supreme Court in Plaintiff's criminal case, that no conduct in Mexico violated Due Process. *Id.* While Plaintiff asserts that he might still possess a *Bivens* cause of action for the plan to kidnap him in Mexico in violation of United States and international law, he agrees that Judge Davies decided this issue and does not seek to relitigate it here. Notice of Non-Opposition to Motion for Summary Judgment on Plaintiff's *Bivens* Claims Filed by Defendants Berrellez, Gruden, Lawn, and Waters at 1. Plaintiff also conceded his ability to pursue a *Bivens* claim based upon his "treatment during his interrogation in Texas." Memoramdum of Points and Authorities in Partial Opposition to Defendant Garate-Bustamante's Motion for Summary Judgment at 2.

Thus, at this stage in the litigation, Plaintiff only advances a "narrow" *Bivens* claim relating to the "Fourth or Fifth Amendment claim with respect to the portion of the kidnapping occuring within U.S. territory." *Id.* at 2-3. In short, Plaintiff asserts a claim based upon his unlawful "seizure" by Sosa, an agent of the United States, for the brief distance between the point at which the airplane crossed the U.S. border to its landing at the airport in El Paso, Texas—a distance of less than five miles. Declaration of Hank Webb at 1.

As an initial matter, the Court notes that Plaintiff can only allege a *Bivens* claim based on this allegedly unlawful seizure under the Fourth, not the Fifth, Amendment. *Graham* v. *Connor*, 490 U.S. 386 (1989); *Armendariz* v. *Penman*, 75 F.3d 1311, 1325-26 (9th Cir.

1996). Plaintiff's claim fails because he cannot demonstrate an unlawful seizure. A grand jury in Los Angeles had indicted Plaintiff for a felony and a judge of this Court had issued a warrant for Plaintiff's arrest. These two facts each independently established the probable cause necessary for a valid seizure under the Fourth Amendment. *Gerstein* v. *Pugh*, 420 U.S. 103, 113-16 (1975). Thus Defendant Sosa, acting on the behalf of law enforcement agents, seized Plaintiff in the United States pursuant to ample probable cause.

Plaintiff attempts to revive his claim by pointing out that the Federal Rules of Criminal Procedure do not authorize private individuals to execute arrest warrants. Yet a violation of a Federal Rule of Criminal Procedure does not rise to constitutional significance. The simple fact remains that probable cause existed to seize Plaintiff in the United States and Defendant Sosa, at the direction of federal law enforcement, made such a seizure. Plaintiff cannot establish a constitutional violation and thus the Court GRANTS the motion for summary judgment on behalf of Defendants Berrellez, Waters, Gruden, Lawn, and Garate-Bustamente.[9]

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[9] These Defendants offer a number of other bases in support of their motions. The Court notes that it would almost undoubtably apply qualifed immunity to the federal employees with respect to this claim even if Plaintiff could demonstrate a violation of the Constitution. The Court would certainly find that a reasonable officer would have thought that he or she could direct another to make an arrest domestically based on a warrant and an indictment. The Court also finds Defendants' argument fairly persuasive that courts might not even apply Fourth Amendment protection to an individual in Plaintiff's situation. *See United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). The Court does not need to reach those alternative arguments because it finds no violation of the Constitution in Plaintiff's seizure within the United States.

IV. United States' Motion for Summary Judgment

The United States faces liability for the actions of its agents pursuant to the Federal Tort Claims Act. Plaintiff has the following claims remaining against the United States: (1) kidnapping, (3) cruel, inhuman, and degrading treatment, (6) assault and battery, (7) false imprisonment, (8) intentional infliction of emotional distress, (9) false arrest, (10) negligent employment, and (11) negligent infliction of emotional distress.[10] The United States divides Plaintiff's claims into three categories: (1) those relating to Plaintiff's arrest in Mexico and return to the United States (false arrest, false imprisonment, kidnapping, intentional infliction of emotional distress, and negligent infliction of emotional distress); (2) those relating to Plaintiff's treatment in Mexico (cruel, inhuman, and degrading treatment, assault and battery, negligent employment, intentional infliction of emotional distress, and negligent infliction of emotional distress), and (3) those relating to Plaintiff's treatment in the United States (intentional infliction of emotional distress and negligent infliction of emotional distress). The Court will adopt this organizational scheme to consider Plaintiff's claims and the defenses offered by the United States.

A. Applicable Law

The Federal Tort Claims Act states that the government faces liability as determined "in accordance with the law of the place where the act or omission oc-

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[10] Plaintiff agreed to abandon his claim for torture (number 2), Judge Davies previously dismissed Plaintiff's claim for prolonged arbitrary detention (number 4), and Plaintiff obviously does not assert his *Bivens* claims (number five) against the United States.

curred." 28 U.S.C. §§ 1346(b), 2672. Federal law determines the scope of the FTCA's exclusions and the determination of who is an "employee" for purposes of the statute. Aside from that, however, "state law . . . determines whether the ultimate facts give rise to a cause of action in favor of the claimant . . . . a cause of action based entirely on federal law, and which has no counterpart in state law, is not cognizable under the Torts Claims Act . . . ." Jayson & Longstreth, 2 *Handling Federal Tort Claims* § 9.09(1) at 9-231 (1997) ("Treatise"). The Treatise also notes that "[o]casionally, state law will incorporate principles of federal law into its tort law, and these principles will be applicable in determining the United States' liability as part of the 'law of the place'." *Id.* at 9-232-33. The Treatise explains that "[a]lthough the general rule dictates that the law of the state where the misconduct occurred governs the liability of the United States, there are some seeming departures from this rule. For example, to the extent that maritime torts are actionable under the Act, they are governed by maritime law." *Id.* at 9-239.

For reasons more fully discussed below, Plaintiff alleges that all of the actions which occurred in Mexico arose from a plan conceived in California. Accordingly, the parties agree that California law applies to the claims for Plaintiff's arrest and treatment in Mexico (category one and two above). Category three depends on actions taken in Texas. The parties have not announced whether they feel that Texas or California law governs that situation. While the entire plan developed in California, the acts in Texas certainly "occurred" in Texas. The Court feels that Texas law should apply to Plaintiff's claims regarding his treatment in Texas

(category three above). As discussed below, however, Texas and California contain virtually identical provisions of law on the issues in question and thus a choice of law analysis would not change the result.

Defendant United States employs the principles of state law at the outset to eliminate some of Plaintiff's claims. First, the United States asserts that California law does not contain a cause of action for kidnapping, or cruel, inhuman, and degrading treatment. Defendant notes that it could not find a case in which a California court recognized either tort. Defendant asserts that the tort claims of false arrest or imprisonment and assault and battery provide a remedy for what Plaintiff terms kidnapping or cruel, inhuman, and degrading treatment. Defendant points to one civil case in which the state had previously convicted the defendant of kidnapping, and the plaintiff brought suit for false imprisonment, assault, and intentional infliction of emotional distress. *White* v. *County of Orange*, 166 Cal. App. 3d 566, 568-69 (1985). Defendant adds that the California Book of Approved Jury Instructions ("BAJI") does not contain an instruction outlining the elements of either claim.

Second, Defendant argues that California law does not recognize an independent cause of action for negligent infliction of emotional distress, but instead considers such claims through a prism of traditional negligence.[11] *Potter* v. *Firestone Tire & Rubber Co.*, 6 Cal.

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[11] Defendant also points out that Texas law agrees with California in this respect and does not contain an independent claim for negligent infliction of emotional distress. *Garza* v. *United States*, 881 F. Supp. 1103, 1108 (S.D. Tex. 1995); *Bowles* v. *Kerr*, 855 S.W.2d 593, 594, 597 (1993) (en banc). Plaintiff does not address this contention.

4th 965, 984 (1993); *Lawson* v. *Management Activities, Inc.*, 81 Cal. Rptr. 2d 745, 748 (Cal. App. 4th Dist. 1999). Third, Defendant explains that false arrest and false imprisonment do not constitute separate torts under California law. *Asgari* v. *City of Los Angeles*, 15 Cal. 4th 744, 752 n.3 (1998); *Collins* v. *City and County of San Francisco*, 50 Cal. App. 3d 671, 673 (1975).

Plaintiff claims that California law does contain a cause of action for kidnapping and cruel, inhuman, and degrading treatment.[12] Plaintiff's argument consists of two parts. First, principles of international law prohibit kidnapping and cruel, inhuman, and degrading treatment. Second, California law incorporates principles of international law into its common law. Plaintiff contends that several American courts have recognized these torts as actionable and adds that a California court would apply "generally agreed upon principles of international law."[13] Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant United States' Motion for Summary Judgment at 4 ("Opp. to U.S. Summ Judg").

The Court concludes that California law does not recognize the torts of kidnapping or cruel, inhuman, and degrading treatment. While Plaintiff correctly observes that California courts have applied international law to certain discrete situations, such as determining California's territorial jurisdiction, Plaintiff

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[12] Plaintiff apparently concedes Defendant's position that California law does not recognize a cause of action for negligent infliction of emotional distress and explicitly agrees that false arrest and false imprisonment constitute one tort.

[13] The Court addresses the issue of international law more fully in section V below, which deals with claims against Defendant Sosa under the Alien Tort Claims Act.

does not cite a single instance in the history of California case law, nor did the Court find an example, in which a California court has incorporated a violation of international law into its domestic law as a tort. In fact, the cases which Plaintiff cites as examples of situations in which American courts have recognized a prohibition on kidnapping or cruel treatment rely on the Alien Tort Claims Act, discussed in section V below, which explicitly contemplates the use of such law. *Abebe-Jiri* v. *Negewo*, 72 F.3d 844 (11th Cir. 1996); *Paul* v. *Arvil*, 901 F. Supp. 330 (S.D. Fla. 1994).

In addition, in this circumstance, Plaintiff's claims for false arrest and false imprisonment merge. The Court also concludes that Texas law does not contain a cause of action for negligent infliction of emotional distress. Accordingly, the Court GRANTS Defendant United States' motion for summary judgment with respect to claims one, three, and eleven (kidnapping, cruel, inhuman, and degrading treatment, and negligent infliction of emotional distress). The Court also GRANTS Defendant United States' motion for summary judgment with respect to claim seven or claim nine (false arrest and false imprisonment) to the extent that the motion challenges Plaintiff's ability to maintain the causes of action separately. The Court will consider these causes as one for the remainder of the case.

B. Negligent Employment

Plaintiff asserts a negligence claim based on Defendant's failure to investigate the backgrounds of the individuals who seized Plaintiff in Mexico. Plaintiff contends that he faced physical and psychological abuse at the hands of those individuals and that "[h]ad the United States learned the identity of the kidnappers,

investigated their backgrounds, or even coordinated the 'arrest' with the Mexican authorities, Plaintiff would not have suffered the injuries he did." Opp. to U.S. Summ Judg at 12-13 (footnote omitted). Defendant argues that Plaintiff cannot demonstrate causation because Plaintiff offers no evidence that the failure to investigate the background of the individuals contributed to Plaintiff's alleged injury.

In California, "[t]o recover on a negligence theory, a plaintiff must prove duty, breach, causation, and damages." *Leslie G.* v. *Perry & Assoc.*, 43 Cal. App. 4th 472, 480 (1996). However, even if the Court accepts Plaintiff's contention that Defendant had a duty to investigate the backgrounds of the individuals involved in Plaintiff's seizure and that Defendant breached that duty, a causal connection must exist between the breach and the alleged harm to Plaintiff. *Id.* at 481. Under section 430 of the Restatement (Second) of Torts, applied by California courts, the negligence must "be a legal cause of the other's harm." Legal cause exists if the negligence serves as a "substantial factor" in causing the harm. Rest. 2d Torts § 431; *Mitchell* v. *Gonzales*, 54 Cal. 3d 1041, 1052 (1991).

Plaintiff cannot demonstrate that a failure by Defendant to learn the identity or investigate the backgrounds of the individuals in Mexico[14] played a

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[14] Plaintiff appears to raise a triable issue of fact regarding whether or not the United States failed to conduct an investigation. Defendant contends that it did not even breach a duty because there is no factual dispute that the government explicitly instructed Barragan to hire law enforcement personnel and to tell those personnel not to injure Plaintiff or even question him. Garate Depo. at 158, 207-08; Berrellez Depo. at 102-04. In addition, Defendant announced that it would not compensate the individuals

"substantial factor" in Plaintiff's injuries. Plaintiff does not demonstrate that any of the individuals who seized Plaintiff in Mexico and conveyed him to the United States had any indications, such as violence, in their background which would have led the United States to not employ them. In fact, the only evidence in the record demonstrates that Sosa had never faced an investigation or even an accusation of violence or excessive force during his time in Mexican law enforcement, and never engaged in any domestic violence.[15] Sosa Depo. at 21.

Plaintiff adduces no evidence that demonstrates that Defendant's failure to investigate the backgrounds of the individuals involved in the operation in Mexico served as the "substantial factor" in Plaintiff's alleged injuries. This situation resembles *Nola M.* v. *University of Southern California*, 16 Cal. App. 4th 421 (1993). In *Nola M.*, the court reversed a jury verdict in favor of a rape victim against the University of Southern California. *Id.* at 424. The victim had contended that the school negligently failed to deter the attack. The court concluded that the plaintiff did not provide any evidence that "two or ten or twenty more guards or other security measures could have prevented Nola's injuries." *Id.* As in that case, this Court

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if Plaintiff arrived in any other condition. Garate Depo. at 173; Berrellez Depo. at 104. Thus Defendant asserts that it took every reasonable precaution to avoid any injury to Plaintiff. The Court does not reach this issue due to Plaintiff's failure to demonstrate causation.

[15] In fact, the only reported time in Defendant Sosa's background when he did abuse his power as a member of law enforcement, he solicited a bribe to *not* arrest someone. Sosa Depo. at 19-20.

has no evidence with which to conclude that an investigation would have provided any reason not to hire these particular individuals or prevented Plaintiff's injuries. Defendant Sosa's deposition shows that Defendant would have found no signs of violence in his background. Accordingly, the Court GRANTS Defendant United States' motion for summary judgment on count ten (negligent employment).

C. Foreign Claim Exclusion

The Federal Tort Claims Act contains an exception which exempts from coverage "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). Congress created this exception to retain sovereign immunity and ensure that the United States did not face liability under the laws of another sovereign. *Smith* v. *United States*, 507 U.S. 197, 201 (1993); *United States* v. *Spelar*, 338 U.S. 217, 221 (1949). Defendant suggests that the foreign claim exclusion prevents any recovery for Plaintiff based on the events that occurred in Mexico because those claims arose in a foreign country.

Plaintiff counters that the Court must decide Federal Tort Claims Act claims based on the law of the place in which the act or omission occurred, not the place where that act or omission had its "operative effect." *Richards* v. *United States*, 369 U.S. 1, 10 (1962); *Cominotto* v. *United States*, 802 F.2d 1127, 1129-30 (9th Cir. 1986). Plaintiff thus advances a "headquarters claim." *Cominotto*, 802 F.2d at 1130; *Leaf* v. *United States*, 588 F.2d 733, 736 (9th Cir. 1978). Plaintiff's headquarters claim contends that while the actual effects occurred in Mexico, all of the decisions about his seizure and removal to the United States, including

Plaintiff's claim for negligent employment, occurred in California.

The Court agrees that Plaintiff has stated a valid "headquarters claim" at least with respect to his claim for false arrest/false imprisonment and intentional infliction of emotional distress from his seizure.[16] Plaintiff's claims in that regard resemble those asserted in

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[16] The Court notes that a typical headquarters claim involves a situation in which negligence occurs domestically, but the injury from that negligence arises in a foreign country. In that situation, all of the elements of the tort of negligence have occurred in a state and only the injury arises elsewhere. Plaintiff alleges torts which arise from intentional, planned conduct. This situation does not fit the traditional headquarters claim because only the decision to arrest Plaintiff occurred in California, while the actual arrest happened in Mexico. Defendant United States thus offers a plausible distinction between this case and much of the case law: Plaintiff cannot allege that all of the elements of the tort occurred in the United States.

The Court did not find many cases that dealt with a headquarters claim based on intentional conduct. However, that finding does not surprise the Court because, as the Court discusses below, the Federal Tort Claims Act contains a general exception for intentional conduct, except on the part of law enforcement officers. Thus only a case like Plaintiff's could raise this question. Nevertheless, the D.C. Circuit did consider a similar situation in *Sami* v. *United States*, 617 F.2d 755 (D.C. Cir. 1979). The *Sami* court refused to apply the foreign claim exception to plaintiff's claim of false arrest in Germany based on the intentional actions of U.S. law enforcement officials in the United States. Indeed, a contrary rule would suggest that the United States could face liability for negligent actions of its officials which cause injury in another country but not the intentional acts of its law enforcement officials which cause the same injury. The Court's decision does not run afoul of the underlying policy of the exception—to prevent the United States from facing liability based on foreign law—because the Court does not apply Mexican law to the causes of action.

a number of cases in which courts have found a valid "headquarters claim" and refused to apply the foreign claim exclusion. Most recently, the Eleventh Circuit decided that the failure of the DEA and Customs to coordinate an operation led to the incarceration of a number of individuals in Honduras. *Couzado* v. *United States*, 105 F.3d 1389, 1894-96 (11th Cir. 1997). In that case, while the actual arrest and injury occurred in Honduras, the court found that the negligent act or omission occurred in the United States. *Id.* A number of other courts have reached similar results where acts or omissions in the United States lead to liability elsewhere. *See Sami*, 617 F.2d at 761-63; *Leaf*, 588 F.2d at 735; *Mulloy* v. *United States*, 884 F. Supp. 622, 633 (D. Mass. 1995) (accepting a headquarters claim based on the failure to warn or supervise); *Donahue* v. *United States Dept. of Justice*, 751 F. Supp. 45, 48-49 (S.D.N.Y. 1990) (allowing a headquarters claim for negligence by an informant working in a foreign country); *Glickman* v. *United States*, 626 F. Supp. 171, 174 (S.D.N.Y. 1985) (finding that a plan developed in the United States but carried out in Paris stated a valid headquarters claim); *In re Agent Orange*, 580 F. Supp. 1242, 1254-55 (E.D.N.Y. 1984) (refusing to apply the foreign claim exclusion to product liability claims when decision to use Agent Orange and development of its technical specifications occurred in the United States).

Plaintiff states a valid "headquarters claim" for his seizure because it stemmed from a plan which developed entirely within the United States. Plaintiff's cause of action for assault and battery and the resulting intentional infliction of emotional distress based on that assault and battery do not raise a "headquarters claim." As set forth above, the undisputed evidence in the re-

cord shows that Defendants Berrellez and Garate explicitly instructed Barragan, and thus Sosa, not to harm Plaintiff, or even question him, during his seizure and trip to the United States. In fact, the United States announced that it would not accept Plaintiff, or pay any money for the operation, if Plaintiff appeared harmed in any way upon his arrival in El Paso. The United States formed no domestic plan to assault or batter Plaintiff. Thus, Plaintiff's cause of action arose in Mexico and the foreign claim exclusion bars recovery against the United States.[17] Accordingly, the Court GRANTS Defendant United States' motion for summary judgment with respect to claim six (assault and battery) and the part of claim eight (intentional infliction of emotional distress) as it relies on claim six. The Court REJECTS the foreign claim exclusion as a basis for

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[17] Plaintiff did assert a negligent employment claim, discussed above, in which he suggests that poor planning in the United States led to his injuries. That claim would also provide the same potential for relief for the same injuries Plaintiff alleges in his assault and battery and intentional infliction of emotional distress based on the battery.

The Court adds that the foreign claim exclusion bars almost the entirety of the claim for assault and battery. Plaintiff has contended throughout this case, and the previous criminal trial, that the agents of the government engaged in a variety of abusive acts in Mexico. The foreign claim exclusion, for the reasons above, clearly bars those claims. Plaintiff could assert, however, that the simple touching for the purposes of the arrest, or fright pursuant to the arrest, constitutes an assault and battery which the government's plan explicitly contemplated. Thus Plaintiff might assert a headquarters claim for assault and battery based on the touching incident to the seizure in Mexico. Plaintiff's claim would survive the foreign claim exclusion if he utilized that theory. The Court will discuss the merits of such a claim, including any privilege to use such minimal force incident to arrest, in subsection E below.

Defendant United States' motion for summary judgment with respect to claim seven and nine (false arrest/false imprisonment) and claim eight as it arises from claim seven and nine.[18]

D. Intentional Tort Exception

Defendant argues that the intentional tort exception prevents liability for Plaintiff's claim of assault, battery, and false arrest/false imprisonment. The Federal Tort Claims Act contains an explicit exception for "any claim arising out of assault, battery, false imprisonment, [or] false arrest" unless the claims arise out of the "acts or omissions of investigative or law enforcement officers of the United States government." 28 U.S.C. § 2680(h). The exception specifically defines "investigative or law enforcement officers" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* Defendant argues, quite simply, that the individuals in Mexico did not fit within this definition of "investigative or law enforcement officers" and thus Plaintiff cannot state a claim against the United States for assault, battery, or false arrest/false imprisonment.

Defendant cites cases in which courts have found that a variety of federal employees do not fall within the definition: Marine security guards, investigators of the

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[18] The Court reaches this conclusion at least as an initial matter. As the Court discusses in subsection E, the Court must decide whether or not Defendant's actions constitute false arrest/false imprisonment based on the "law of the place," in this case California. To the extent that California would utilize foreign law to hold the United States accountable, the policy behind the foreign claim exclusion will arise again.

Equal Employment Opportunity Commission, federal magistrates and judges, Assistant United States Attorneys, and parole officers. *See* Memorandum of Points and Authorities in Support of United States' Motion for Summary Judgment at 20-21 and cases cited *infra*. The Court's research also produced a case in which the court applied the exception to the actions of non-law enforcement individuals who tricked members of law enforcement into an unjustified arrest. *Metz* v. *United States*, 788 F.2d 1528 (11th Cir. 1986). However, the Court's research did not turn up a case which presented the opposite scenario: a law enforcement officer who directed someone else to perform a false arrest or imprisonment.

Plaintiff offers two basic arguments in response. First, the individuals in Mexico acted as law enforcement officers for these purposes. Second, Plaintiff's claim contemplates liability for the actions of the law enforcement officers in the United States and those individuals should face liability for instructing others to do what the law enforcement individuals could not. Plaintiff couples this argument with the observation that the law enforcement exception to the intentional tort exception exists to protect "innocent victims of Federal law enforcement abuses." *Sami*, 617 F.2d at 764 (quoting S. Rep. No. 588, 93rd Cong., 1st Sess. 3-4 (1973)). The Court finds this second argument persuasive. As noted above, the Court does not know of a case in which a court applied the intentional tort exception to an individual who acted at the direction of a law enforcement officer. That result would not make sense: law enforcement officers could enlist private citizens or others to commit torts and thus shield the United States from liability. For this reason, the Court RE-

JECTS the intentional tort exception as a basis for Defendant United States' motion for summary judgment.

E. False Arrest/False Imprisonment

The Court has already found that the exclusions in the Federal Tort Claims Act bar a number of Plaintiff's claims against the United States. The Court must still address, however, Plaintiff's claims for false arrest/false imprisonment and intentional infliction of emotional distress based on that arrest.[19]

As outlined in subsection A above, the Court must apply the law of the place, California, under the Federal Tort Claims Act.[20] The Court cannot apply federal law, unless California courts would look to federal standards in reaching their decisions; the Court also cannot apply international law, because the Court found that California law does not include torts based on the law of nations. Finally, the Court cannot apply the law of a foreign sovereign, in this case Mexico, due to the foreign claim exclusion and the policy of *Spelar*. Thus the

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[19] As noted above, Plaintiff may also retain a claim for assault and battery and intentional infliction of emotional distress, but only to the extent required for an arrest.

[20] The Court must apply the whole of California law, which includes its choice of law rules. *Richards* v. *United States*, 369 U.S. 1 (1962). The Court assumes that California would apply its own forum law. *Marsh* v. *Burrell*, 805 F. Supp. 1493, 1496 (N.D. Cal. 1992); *Hurtado* v. *Superior Court*, 11 Cal. 3d 547 (1974) (en banc). If the Court concluded that California would apply the law of Mexico, then the foreign claim exclusion would bar Plaintiff's claims. *Spelar*, 338 U.S. at 221. *See also* James A. Shapiro, *Choice of Law Under the Federal Tort Claims Act: Richards and Renvoi Revisited*, 70 N.C.L. Rev. 641, 659-60 (1992).

Court must determine how a California court would analyze Plaintiff's tort claims.[21]

California defines a false arrest as an arrest conducted without lawful authority. *See, e.g., Scofield* v. *Critical Care Medicine, Inc.*, 45 Cal. App. 4th 990 (1996). Defendant argues that the existence of a felony warrant and indictment made lawful an arrest by Sosa at the direction of federal law enforcement. Plaintiff counters that any statutory immunity does not apply to these actions and that malice on the part of the arresting individuals made the arrest unlawful.

California law distinguishes between "peace officers" and private individuals with respect to the ability to make lawful arrests. California Penal Code section 834 provides that a peace officer or a private person can make an arrest. Section 837 states that a "private person may arrest another . . . When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it." Section 836 allows a peace officer to make an arrest "[w]henver he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed." The courts of California treat peace officers like private citizens

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[21] The Ninth Circuit has applied the law of the state for FTCA purposes even when that law was "riddled [ ] with exceptions and inconsistencies" compared to a rational approach taken by another state. *Epling* v. *United States*, 453 F.2d 327, 329 (9th Cir. 1971). In addition, when the highest court of a state has not ruled, the district court must "make a reasonable determination, based upon such recognized sources as statutes, treaties, restatements and published opinions, as to the result that the highest state court would reach if it were deciding the case." *Molsbergen* v. *United States*, 757 F.2d 1016, 1020 (9th Cir. 1985).

when those peace officers make arrests outside of their jurisdiction.[22] *See, e.g., People v. Monson*, 28 Cal. App. 3d 935, 939-40 (1972); *People v. Califano*, 5 Cal. App. 3d 476, 484 (1970). Thus California clearly allows a private citizen or a peace officer to make an arrest pursuant to a valid felony warrant and indictment.

The parties discuss one other provision of California law. Civil Code section 43.55, formerly section 43.5(a), states that "[t]here shall be no liability on the part of, and no cause of action shall arise against, any peace officer who makes an arrest pursuant to a warrant of arrest regular upon its face if the peace officer in making the arrest acts without malice and in the reasonable belief that the person arrested is the one referred to in the warrant." Thus California does not allow a suit for false arrest when (1) an officer makes an arrest pursuant to a warrant or (2) when the arrest occurs with lawful authority. In other words, California would not hold a peace officer liable for an arrest pursuant to a warrant valid on its face which later proves deficient; California would also not find any individual liable for false arrest if he or she made an arrest after a felony had been committed and the individual had reason to believe that the arrestee committed the offense.

These provisions do not provide a complete answer to the question in the instant case. Had a private citizen or a California peace officer arrested Plaintiff in California, a California court would clearly not hold that

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[22] California law allows the use of some force incident to an arrest. Section 835(a) allows a peace officer to use "reasonable force" to effect the arrest, while section 835 states more generally that the "person arrested may be subjected to such restraint as is reasonable for his arrest and detention."

individual liable for false arrest or imprisonment.[23] Yet Defendant Sosa, at the direction of federal law enforcement, arrested Plaintiff in Mexico pursuant to a valid United States warrant and indictment. The question for this Court then is how a California court would apply principles of California law to that situation. One permutation of this situation might prove instructive. What would a California court do if an individual came into California and arrested a person based on a warrant and indictment issued in another state or another country? While the Court finds this an exceedingly difficult hypothetical inquiry, it concludes that a California court would not hold Defendant Sosa or the federal law enforcement agents liable in this situation.

Plaintiff argues that a California court would draw a decisive distinction at the border of the United States and refuse to approve of an arrest in another country. The Court disagrees. California law approves of arrests made pursuant to a warrant or indictment. While California law clearly does not apply outside of its borders, if California considered an extraterritorial arrest through the lens of its own law, it is unclear why the border would make a difference. For instance, California extends reciprocity to law enforcement officers of other states. Penal Code section 852.2 allows a foreign peace officer who enters California in "fresh pursuit" to exercise the same authority to arrest and

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[23] Plaintiff points out that the Federal Rules of Criminal Procedure limit the ability to utilize federal arrest warrants to members of federal law enforcement. Nevertheless, the existence of a federal warrant and indictment clearly provides probable cause for any individual to conclude that a felony has been committed and the person named in the warrant may have committed it.

hold a person in custody as a peace officer of California, provided that the foreign peace officer takes the prisoner before a magistrate in the county of the arrest. In addition, California does not appear to limit the definition of "private person" to only citizens of California.[24] Thus if a peace officer, or any individual, from another state entered California with the requisite probable cause to arrest an individual, then California would presumably not consider that action a false arrest.

Plaintiff offers two reasons for rejecting this interpretation of the law of California. First, he argues that the immunity granted by Civil Code section 43.55 does not apply to this situation. Plaintiff cites a few Ninth Circuit cases which seem to indicate that state immunity principles should not limit federal liability under the FTCA. *See Stuart* v. *United States*, 23 F.2d 1483, 1488 (9th Cir. 1994); *Wright* v. *United States*, 719 F.2d 1032, 1034-35 (9th Cir. 1983). Defendant counters with specific cases in which the Ninth Circuit has applied state immunity principles to a claim of false arrest under the FTCA. *See Tinc* v. *United States*, 927 F.2d 1504, 1514 (9th Cir. 1991); *Arnsberg* v. *United*

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[24] The Court notes that some cases discuss an arrest by a private person as a "citizen's arrest," but it appears that courts use that term in a colloquial sense. *See, e.g., Johanson* v. *Department of Motor Vehicles*, 36 Cal. App. 4th 1209, 1216 (1995); *People* v. *Taylor*, 222 Cal. App. 3d 612, 618-19 (1990). The Court did not find any case in which a California court limited the definition of private person to a citizen of California. That result makes sense: it would create quite an anomaly if a visitor to the state could witness a felony but not restrain the perpetrator even though any other law abiding citizen could do so.

States, 757 F.2d 917 (9th Cir. 1985).[25] The Court concludes that *Tinc* directly governs this situation. Even though the parties have characterized the issue in terms of immunity, these arguments are more properly addressed in the context of a failure of proof. Defendant does not assert "immunity" in the sense used in the cases cited above. Instead, Defendant contends that the actions of the officers and Sosa do not amount to the tort of false arrest because California law considers their actions lawful. Because Plaintiff's arrest did not occur "without lawful authority," Plaintiff fails to satisfy an element of the tort.

Plaintiff's argument falls short for another reason: Civil Code section 43.55 applies to arrests made by peace officers pursuant to a warrant. Defendant does not only claim a defense based on the warrant, but instead says that the existence of the warrant and indictment created probable cause such that any citizen could lawfully arrest Plaintiff. Defendant does not claim that Sosa served the arrest warrant on Plaintiff in Mexico, it only contends that Sosa acted with lawful authority because of his knowledge of Plaintiff's connection to a felony.

Plaintiff also attempts to use the concept of malice to make the arrest unlawful. Civil Code section 43.55, discussed above, requires a peace officer to act without "malice" to receive the protection that the use of a warrant provides. California courts have found "malice" in situations where peace officers have made knowing

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[25] Plaintiff's counsel admitted at the hearing that these two lines of cases seem to conflict. Nevertheless, he candidly admitted that *Tinc* provides the most relevant precedent for the false arrest situation. The Court follows *Tinc* in this instance and leaves harmonization of the precedents for a later case which raises the issue.

omissions in obtaining a warrant or executed a warrant with the knowledge that it did not remain in force. *Laible* v. *Superior Court*, 157 Cal. App. 3d 44, 53 (1984); *McKay* v. *County of San Diego*, 111 Cal. App. 3d 251, 255-56 (1980); *Milliken* v. *City of South Pasadena*, 96 Cal. App. 3d 834, 842 (1979).

Plaintiff claims that because Defendant Sosa and the federal defendants knew that a Mexican arrest warrant did not exist, and that a United States federal warrant does not apply outside the United States, the arrest was with malice.[26] Each of these bases fail to demonstrate malice. As discussed above, California does not rely on the valid exercise of a warrant to immunize arrests. In order for a private citizen to make a lawful arrest, that citizen must only know that a felony has occurred and have a reasonable basis to think that the arrested individual committed the crime. The Defendants knew this, even if they could not lawfully exercise the warrant outside of the United States. Plaintiff cannot rely on the lack of a Mexican warrant, because that would make an arrest unlawful based on the law of Mexico—a result foreclosed by *Spelar* discussed above. From the perspective of California law, Defendants knew that a felony had occurred and had reason to

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[26] Section 43.55 provides immunity when an officer acts pursuant to a warrant that is valid on its face. The law attempts to shield officers from liability for executing warrants which later prove groundless or erroneous. That situation does not exist here: Defendants do not rely on a warrant later proven invalid. Neither party disputes that probable cause existed to arrest Plaintiff. The parties only disagree about whether Defendant Sosa could arrest Plaintiff in Mexico. Under California law, however, Sosa, a private citizen, or the law enforcement agents, could make a lawful arrest based on probable cause. Section 43.55 could provide immunity, but Defendants do not rely only on the provisions of that section.

think that Plaintiff committed it. That created a basis for an arrest by a peace officer or a private citizen.

The Court notes that this entire inquiry seems somewhat artificial. California has never faced the unusual situation presented in this case and does not have law which appears to address it. The Court finds no indication that California would allow a person in Plaintiff's position to sue a California individual or peace officer for an arrest in Mexico. However, given the possibility that California might allow such a claim, the Court has attempted to examine this situation in significant depth. Perhaps, absent the ability to sue in federal court, a plaintiff in this situation might sue in Mexico. Perhaps, instead, California would look to Mexican law in its choice of law analysis. Unfortunately for Plaintiff, neither position helps him in this case. The Court cannot look to Mexican law, even if the Court concluded that a California court would apply it. Nevertheless, the Court feels that California courts would apply California law and find that the warrant and indictment supported the arrest. Accordingly, the Court GRANTS Defendant United States' motion for summary judgment with respect to Plaintiff's seventh and ninth claim (false arrest/false imprisonment) and Plaintiff's eighth claim with respect to the arrest (intentional infliction of emotional distress[)]. As discussed above, to the extent that Plaintiff's sixth claim (assault and battery) stems from the minimal force needed to arrest Plaintiff, California law does not allow that force to amount to a tort. *See* Cal. Civil Code § 835(a). Thus the Court also GRANTS Defendant United States' motion for summary judgment with respect to Plaintiff's sixth and eighth causes of action based on the use of minimal

force or the alleged fear from the use of that minimal force.

F. Events in El Paso

At the outset of the litigation, Plaintiff alleged a number of factual predicates in support of his claims for intentional and negligent infliction of emotional distress.[27] He claimed that United States agents threatened him, kept him in a windowless room, photographed him naked, denied him food and water, and booked him under a false name to prevent contact with his family. The United States argues that it kept him in the windowless room and took the pictures for valid law enforcement reasons; offered him food, water, and sodas; accidentally booked him under a false name and allowed him to call his family; and never threatened Plaintiff. Plaintiff appears to have conceded some of the factual predicates for his claim at the hearing.

In Texas, intentional infliction of emotional distress requires proof that "(1) the defendant acted intentionally or recklessly, (2) the conduct was extreme and outrageous, (3) the actions of the defendant cause the plaintiff emotional distress, and (4) the emotional distress suffered by the plaintiff was severe." *ITT Consumer Financial Corp.* v. *Tovar*, 932 S.W.2d 147, 158 (Tex. Ct. App. 1996). *See also Twyman* v. *Twyman*, 855 S.W.2d 619, 621-22 (Tex. 1993). While Defendant cites some persuasive cases on the contours of intentional infliction of emotional distress in Texas, the Court finds that a factual dispute exists regarding the activities in El Paso. Accordingly, the Court DENIES Defendant

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[27] The Court above granted Defendant United States' motion for summary judgment on the negligent infliction of emotional distress claim.

United States' motion for summary judgment on Plaintiff's eighth cause of action (intentional infliction of emotional distress) with respect to the events in Texas. While the Court above granted summary judgment with respect to Plaintiff's eighth claim arising out of the alleged events in Mexico, the Court will allow Plaintiff to present evidence regarding events in Mexico as background to Plaintiff's claims in Texas.[28]

V. Defendant Sosa's Motion for Summary Judgment

Plaintiff asserts the same claims against Defendant Sosa as he does against Defendant United States, except those claims arise under common law or the Alien Tort Claims Act, 28 U.S.C. § 1350. Plaintiff has abandoned his second cause of action for torture against Defendant Sosa. Defendant Sosa moves for summary judgment with respect to all of Plaintiff's claims. Plaintiff also filed a motion for partial summary judgment with respect to his claims under the Alien Tort Claims Act.

A. Alien Tort Claims Act

The Alien Tort Claim Act ("ATCA") provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Congress enacted the Alien Tort Claims Act as part of the First Judiciary Act of 1789, but courts seldom invoked it until recently. The "debates that led to the Act's passage contain no reference to the Alien Tort Statute, and there is not direct evidence of what the

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[28] Plaintiff will also be able to introduce evidence and recover for the events in Mexico, if proven, against Defendant Sosa as discussed below.

First Congress intended it to accomplish." *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992) ("*Estate I*").

Despite this lack of historical guidance, several prominent opinions have provided a basis for application of the statute. *See, e.g., Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). The Ninth Circuit has announced that the statute requires "a claim by an alien, a tort, and a violation of international law." *Estate I*, 978 F.2d at 499. Defendant does not contest that Plaintiff's kidnapping claim meets the first two conditions. Defendant simply argues that kidnapping does not violate clearly established international law.

The Court must interpret the law of nations "not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Kadic* v. *Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (quoting *Filartiga*, 630 F.2d at 881). The Court finds these norms by "'consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" *Filartiga*, 630 F.2d at 880 (quoting *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820)). In order to state a cause of action under the ATCA, the norm of international law must be "specific, universal, and obligatory." *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998) (citing *In re Estate of Ferdinand E. Marcos*, 25 F.3d 1467 (9th Cir. 1994) (*Estate II*).

Plaintiff has three causes of action which depend on international norms under the ATCA: kidnapping,

cruel, inhuman, and degrading treatment, and prolonged arbitrary detention.[29]

1. Kidnapping

While no United States court has ever found "kidnapping" cognizable under the ATCA, two courts have hinted at that result. *Nguyen Da Yen* v. *Kissinger*, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975) (stating that the "illegal seizure, removal and detention of an alien against his will in a foreign country would appear to be a tort . . . and it may well be a tort in violation of the 'law of nations'" but refusing to reach the issue) (citation omitted); *Jaffe* v. *Boyles*, 616 F. Supp. 1371, 1378 (W.D.N.Y. 1985).[30] Plaintiff characterizes his claim as not one merely for kidnapping, but for "state-sponsored

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[29] Plaintiff devotes much of his brief in support of summary judgment to a discussion of kidnapping. Plaintiff does not move for summary judgment on the other two grounds, but does argue that international norms prohibit Defendant Sosa's behavior under both of them. The Court observes that while a factual dispute may exist about "cruel, inhuman, and degrading treatment," if, in fact, the ATCA allows such a claim, a dispute does not exist about Plaintiff's detention. The parties agree that Defendant Sosa and others detained Plaintiff for approximately twenty four hours before delivering him to United States authorities in El Paso. The Court finds the matter of the prolonged, arbitrary detention claim ripe for summary judgment because no factual dispute exists. As discussed below, however, the Court will not rule on that issue until further discussion at the pretrial conference.

[30] In addition, the Ninth Circuit's recent recognition of prolonged arbitrary detention as a basis for a claim under the Alien Tort Claims Act, see subsection 3 below, reinforces the conclusion that kidnapping does violate the ATCA. Defendant Sosa's position would require the Court to conclude that an arbitrary detention violates international law for ATCA purposes, but entering another country to kidnap one of its citizens does not.

abduction within the territory of another state without its consent." Plaintiff cites a wealth of international authority[31] to support the idea that such international abduction violates both the principles of state sovereignty and an individual's right to the security of his or her person in his or her own nation.

Defendant Sosa offers a number of arguments against Plaintiff's position. First, Sosa argues that the Ninth Circuit has already rejected kidnapping as an action which violates international law in *United States* v. *Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995). The court in *Matta-Ballesteros* faced the request to dismiss an indictment by another individual removed from his country as part of the Camarena investigation. The Ninth Circuit declined the request and stated that "kidnapping . . . does not qualify as a *jus cogens* norm, such that its commission would be justiciable in our courts even absent domestic law." *Id.* at 764 n.5. However, that footnote only means that kidnapping does not rise to the level of *jus cogens*, or the "highest status within customary international law . . . binding on all nations." *Id.* The court only made that observation to demonstrate that it need not dismiss the indictment

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[31] As one example, Plaintiff cites the Restatement (Third) of Foreign Relations Law of the United States section 432(2) that a "state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state." Reporter's note number one to that section commented, as early as 1986, that "[n]one of the international human rights conventions to date . . . provides that forcible abduction or irregular extradition is a violation of international human rights law. However, Articles 3, 5, and 9 of the Universal Declaration of Human Rights, as well as Articles 7, 9, and 10 of the International Covenant on Civil and Political Rights might be invoked in support of such a view."

pursuant to an overriding principle of international law. The court did not decide whether customary international law prohibited kidnapping or consider the issue with respect to the ATCA. The Court finds that *Matta-Ballesteros* provides no insight into how the Ninth Circuit would resolve this case.

Sosa next contends that a universal consensus does not exist that kidnapping violates international law. Sosa argues that a plethora of international abductions have occurred since 1835 and that no international agreement explicitly prohibits them. Sosa then cites a number of student notes in law reviews which suggest that international law does not prohibit abductions. Sosa also argues that because any norm against kidnapping does not rise to the level of *jus cogens* the ATCA does not allow recovery.

Plaintiff convincingly rebuts these arguments. He suggests that the simple fact that countries have performed international abductions does not mean that such actions do not violate international law. As Plaintiff points out, torture and even genocide occur frequently, but that fact does not suggest that the international community does not universally condemn such actions. In addition, the majority of scholarly analysis which deals with the topic concludes that transnational abduction violates customary international law. *See, e.g.*, Abraham Abramovsky, *Extraterritorial Abductions: America's 'Catch and Snatch' Policy Run Amok*, 31 Va. J. Int'l L. 151, 204-05 (1991) (stating that "abductions remain violations of both international law and the law at the asylum country. . . . customary international law is offended"). Finally, the ATCA only requires that an international law be "specific, universal, and obligatory." It does not require

the international law to rise to the level of *jus cogens*. In fact the most recent ATCA case in the Ninth Circuit, *Martinez*, found a clear international prohibition on arbitrary arrest and detention without any mention of the prohibition rising to the level of *jus cogens*. 141 F.3d at 1384.

Defendant Sosa next suggests that the principle of state sovereignty does not support Plaintiff's claim because Plaintiff does not have standing to seek redress for a violation of Mexico's territorial integrity. Plaintiff correctly rebuts this argument by pointing out that the ATCA allows a Plaintiff to assert a cause of action for any violation of international law which amounts to a tort, as long as the law is specific, universal, and obligatory. Plaintiff points out that he offers two independent sources of international law: the principles of state sovereignty and international human rights which prohibit transborder abductions.

Finally, Sosa contends that the United States has rejected the idea that transnational abductions violate international law. Sosa explains that the Executive Branch has concluded that the actions at issue here do not violate international law and that the Bilateral Extradition Treaty with Mexico allowed the abduction. The Court disagrees with both contentions. First, Sosa relies on the "Barr Opinion," issued by the Office of Legal Counsel of the United States Department of Justice, to suggest that the Executive Branch finds extraterritorial abductions consistent with international law. Yet the Barr Opinion discusses an entirely different issue. 1989 O.L.C. Lexis 19. That opinion reversed a prior opinion of the Office of Legal Counsel and concludes that the President and the Attorney General have the power to order the Federal Bureau of Investi-

gation to "carry out extraterritorial law enforcement activities that contravene customary international law." *Id.* at *1. The opinion clearly assumed that extraterritorial abduction violates customary international law—the author merely concluded that the government has the ability to decide to contravene that law. Properly read, the Barr Opinion supports Plaintiff's claim that Defendant Sosa violated international law by abducting Plaintiff in Mexico. Sosa does not contend that the President or the Attorney General made the decision to displace international law in the case of Plaintiff's abduction.

The Court also rejects Sosa's argument that the Extradition Treaty made Plaintiff's abduction lawful. The Supreme Court did find that Plaintiff's abduction did not violate the Extradition Treaty between the United States and Mexico and refused to incorporate principles of international law into the Treaty. *United States* v. *Alvarez-Machain*, 504 U.S. at 669-70 (1992). Yet as Plaintiff points out the Court only found that the abduction did not violate the Treaty, not that it did not violate customary international law. In fact, Plaintiff's counsel points out that the Supreme Court noted at oral argument that Plaintiff did "not argue that these sources of international law provide an independent basis for the right . . . not to be tried in the United States." 504 U.S. at 666.

In short, the Court concludes that "specific, universal, and obligatory" norms of international law prohibit state-sponsored, transborder abductions. The Court does not find that these norms rise to the level of *jus cogens*, but nevertheless finds them sufficiently established and articulated to support a cause of action under the Alien Tort Claims Act. Because the parties

agree that Defendant Sosa conducted a transborder abduction, the Court DENIES Defendant Sosa's motion for summary judgment and GRANTS Plaintiff's motion for summary judgment with respect to Plaintiff's first cause of action (kidnapping).

2. Cruel, Inhuman, and Degrading Treatment

Defendant Sosa offers two related arguments against Plaintiff's claim for cruel, inhuman, and degrading treatment. First, Sosa suggests that even if international law recognizes a prohibition on such treatment, that prohibition is not universal and definable. Second, Sosa contends that even if subsequent case law has given specific content to the claim of cruel, inhuman, and degrading treatment, it did not exist in 1990 at the time of Plaintiff's seizure and alleged mistreatment. Defendant Sosa relies on a case from a district court in this circuit which concluded that a plaintiff could not prevail on a claim for cruel, inhuman, and degrading treatment because of the vagueness inherent in that concept, *Forti* v. *Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) ("*Forti I*"). The *Forti* court felt that without a definition of what constitutes such treatment, it could not consider the cause of action. *Forti* v. *Suarez-Mason*, 694 F. Supp. 707, 711-12 (N.D. Cal. 1988) ("*Forti II*").

Plaintiff responds that international law clearly prohibits cruel, inhuman, and degrading treatment, and that prohibition has content which United States courts have enforced under the Alien Tort Claims Act. *See, e.g., Jama* v. *INS*, 22 F. Supp. 2d 353 (D.N.J. 1998) *Xuncax* v. *Gramajo*, 886 F. Supp. 162, 186-87 (D. Mass. 1995); *Abebe-Jiri* v. *Negewo*, 1993 WL 814304, *4 (N.D.

Ga.), *aff'd*, 72 F.3d 844 (11th Cir. 1996).[32] One of these cases, *Xuncax*, struggled with the question of the content of the international norm. 886 F. Supp. at 186 ("it is evident that the prohibition against such treatment poses more complex problems of definition than are presented by the norms forbidding torture"). The *Xuncax* court rejected the argument that the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of October of 1990 provided clarity to this norm. Ultimately, the court concluded that the United States Constitution provided the answer: "any act by the defendant which is proscribed by the Constitution of the United States and by a cognizable principle of international law plainly falls within the rubric of 'cruel, inhuman or degrading treatment' and is actionable before this Court under § 1350." *Id.* at 187.[33]

The Court agrees with the cases that link the concept of cruel, inhuman, and degrading treatment to constitutional requirements. However, while a plaintiff might sustain a claim under the ATCA for certain types of treatment, the Plaintiff in this case may not do so for two reasons. First, the Court cannot say with any certainty that a universal consensus existed regarding the content of the tort at the time of the events in this case.

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[32] The Ninth Circuit has explicitly not reached this issue but did engage in a discussion about it with respect to its status as an international norm. *Sison* v. *Marcos*, 103 F.3d 789, 794-95 (9th Cir. 1997).

[33] In the other cases cited above, the courts appear to reach a similar conclusion without addressing the issue. In those cases, the courts found liability under a cruel, inhuman, and degrading treatment claim in situations where the conduct would also have violated the standards of the United States Constitution.

International law clearly prohibited cruel, inhuman, and degrading treatment before 1990, *see Restatement (Third) of Foreign Relations Law* § 702(d), but events after 1990 helped to establish its content for purposes of the ATCA.[34] Second, more importantly, the law of the case prevents Plaintiff from maintaining this cause of action. Plaintiff has pled a variety of alleged mistreatment which supports his claim for cruel, inhuman, and degrading treatment. Yet, as noted above, the Ninth Circuit has already held in a prior appeal in this case that no conduct occurred in Mexico which would violate Due Process. *Alvarez*, 107 F.3d at 702. Accordingly, Plaintiff cannot raise a triable issue of fact to support a claim for cruel, inhuman, and degrading treatment because that claim depends on conduct sufficient to violate the Constitution. Plaintiff has raised a triable issue of fact regarding whether or not his treatment in Mexico amounts to an assault and battery, as discussed below. The preclusive effect of the law of the case prevents his cruel, inhuman, and degrading treatment claim. The Court therefore GRANTS Defendant Sosa's motion for summary judgment with respect to Plaintiff's third cause of action.

3. Prolonged Arbitrary Detention[35]

This circuit has recognized the "clear international prohibition against arbitrary arrest and detention" and

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[34] As noted above, the Senate did not consent to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment until October of 1990, and the *Xuncax* court relied, at least in part, on that action in its decision to utilize Constitutional principles.

[35] As noted above, the Court will not decide the issue of summary judgment on this ground until after a further discussion with the parties at the pretrial conference.

established the right of aliens to sue on this basis under the Alien Tort Claims Act. *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998). *See also Forti* v. *Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987), *reconsidered on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988). The Ninth Circuit in *Martinez* explained that "detention is arbitrary 'if it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person.'" *Id.* (citing Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt. h (1987)). Nevertheless, the court rejected Martinez's claim because the authorities arrested him pursuant to law, under a valid Mexican arrest warrant, and did not detain him for a long period of time without informing him of the charges or allowing him to contact his family. *Id.*

Defendant Sosa points out that he only kept Plaintiff in custody in Mexico for approximately twenty four hours—much less time than the Ninth Circuit approved in *Martinez*. Plaintiff's claim does not depend on the length of his detention, however. Plaintiff points out one crucial difference from the facts of *Martinez*: in that case, Mexican authorities arrested the wrong individual pursuant to a Mexican warrant at the behest of the United States. Thus in *Martinez*, the arrest occurred lawfully, albeit mistakenly, and the detention occurred in a manner consistent with common practice. In this case, Defendant Sosa appears to have detained Plaintiff without lawful authority.[36] The Ninth Circuit

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[36] Freed from the strictures of the Federal Tort Claims Act, the Court can find Sosa's arrest of Plaintiff in Mexico unlawful. The Court could not find that action unlawful for purposes of the Federal Tort Claims Act, which required a narrow examination

deems such a detention arbitrary and the Court presumes that a detention of twenty four hours without any lawful basis can establish a claim for prolonged arbitrary detention.[37] The Court thus reports its inclination to grant summary judgment in favor of Plaintiff on this claim. Nevertheless, because Plaintiff did not move for summary judgment on this basis, the Court will reserve a ruling on Plaintiff's fourth cause of action (prolonged arbitrary detention) with respect to the detention that occurred in Mexico.[38]

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based on California law, for the reasons discussed above. Nevertheless, the Court may consider other sources of law against Defendant Sosa, and those sources demonstrate the lawlessness of the arrest. The Court has already deemed the action "kidnapping" in violation of international law. Defendant Sosa made the arrest in Mexico without any Mexican authority to do so. Accordingly, the Court can conclude that Sosa made an unlawful detention, even though the Court could not reach that conclusion with respect to Defendant United States because of the limitations in the Federal Torts Claims Act.

[37] Plaintiff argues that Defendant Sosa should face liability for the entire time of Plaintiff's detention from seizure in Mexico through the time in the United States. Plaintiff argues that Sosa knew that the United States would detain Plaintiff domestically and thus is responsible for that detention. However, from the time Plaintiff entered federal custody in the United States his detention ceased to be unlawful. Thus, at that point, it appears to the Court that Plaintiff did not suffer arbitrary detention. In addition, while Plaintiff did remain in custody for a significant period of time, the traditional protections afforded to criminal defendants attached to Plaintiff and he cannot claim that his detention was unnecessarily prolonged. Accordingly, the Court is inclined to limit summary judgment in favor of Plaintiff to Plaintiff's claim for prolonged arbitrary detention by Sosa in Mexico to the point of entry into the United States.

[38] The Court also notes that Plaintiff's cause of action for kidnapping and prolonged arbitrary detention appear to overlap in

B. Remaining Claims

Plaintiff also asserts a number of other claims against Defendant Sosa. The Court will address these in less detail given the extensive treatment of the same claims against the United States and the other individual defendants.

1. Bivens

Plaintiff asserts [] the same claim under *Bivens* against Defendant Sosa as he does against the other federal defendants. Because the Court found above that no constitutional violation occurred for the "seizure" in United States airspace, Plaintiff cannot recover on this claim. Accordingly, the Court GRANTS Defendant Sosa's motion for summary judgment on Plaintiff's fifth cause of action.

2. Assault and Battery

Plaintiff seeks to recover, under a common law theory of assault and battery, for the events surrounding his seizure and transportation to the United States. Defendant Sosa argues that Plaintiff does not offer any evidence that Sosa ever touched Plaintiff in any way and that the lawful nature of the arrest imunizes the force required to actually make the arrest itself. Plaintiff counters that the nature of the events prevented Plaintiff from identifying the individuals who assaulted him and thus Sosa can still face liability for his involvement. *See Ybarra* v. *Spangard*, 25 Cal. 2d

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this case: either provides a basis for relief for Plaintiff's removal from Mexico to the United States. The Court has not yet considered the issue of damages, but asks the parties to consider the interrelation of these causes of action before the pretrial conference.

486 (1944). While Sosa denies ever touching Plaintiff, or having any knowledge that any other individual injured him, Sosa does admit his involvement in the seizure and his presence at the house in which Plaintiff says he faced abuse. The Court thus finds a triable issue regarding Sosa's behavior in Mexico.[39] The Court notes that the preclusive effect of the Ninth Circuit ruling does suggest that no treatment occurred in Mexico that rose to the level of a violation of the Fifth Amendment. Nevertheless, a wide range of conduct falls between a mere touching and a violation of the Constitution. Accordingly, the Court DENIES Defendant Sosa's motion for summary judgment with respect to Plaintiff's sixth cause of action (assault and battery).

3. False Arrest/False Imprisonment

Plaintiff also asserts a common law claim for false arrest/false imprisonment based on the seizure in Mexico. The Court addressed this claim above in its discussion of the Federal Tort Claims Act. The Court believes that under California law, a court would find Defendant Sosa's actions lawful due to the citizen's arrest concept embodied in the state law.[40] Accordingly,

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[39] The Court's conclusion that Sosa lawfully arrested Plaintiff under the law of California might prevent liability based on the actual touching involved in the arrest itself. Nevertheless, the Court feels that a triable issue exists on the events in Mexico and will consider this issue again at trial.

[40] Of course, if a California court looked to the law of Mexico to determine the lawfulness of the seizure, that court might conclude that Sosa's actions did amount to a false arrest or false imprisonment. As discussed above, this Court could not apply the law of Mexico to find the United States liable under the Federal Tort Claims Act, but Defendant Sosa could not assert a foreign claims exception. Nevertheless, because the Court believes that a Cali-

the Court GRANTS Defendant Sosa's motion for summary judgment with respect to Plaintiff's seventh/ninth cause of action (false arrest/false imprisonment).

4. Intentional Infliction of Emotional Distress

Plaintiff asserts a claim for intentional infliction of emotional distress against Defendant Sosa based on the alleged events from the time of the seizure in Mexico to Plaintiff's delivery to Agent Berrellez in El Paso. Defendant Sosa argues that Plaintiff cannot demonstrate any evidence of outrageous conduct as required to establish such a tort. For the same reasons as in the assault and battery section above, the Court feels that Plaintiff has raised a triable issue of fact on this ground. Accordingly, the Court DENIES Defendant Sosa's motion for summary judgment on Plaintiff's eighth cause of action.

VI. Conclusion

For all the reasons outlined above, the Court: (1) DENIES Defendant Sosa's motion for substitution; (2) GRANTS Defendants Bellerez, Gruden, Lawn, and Waters' motion for summary judgment; (3) GRANTS Defendant Garate-Bustamante's motion for summary judgment; (4) GRANTS Defendant United States' motion for summary judgment in part and DENIES that motion in part; (5) DENIES Plaintiff's motion for partial summary judgment against Defendant United States; (6) GRANTS Defendant Sosa's motion for summary judgment in part and DENIES that motion in

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fornia court would apply its own law, the Court does not reach this issue. In practical term, this cause of action appears to overlap with the one for kidnapping and arbitrary detention discussed above.

part; and (7) GRANTS Plaintiff's motion for partial summary judgment against Defendant Sosa in part and DENIES that motion in part; (8) RESERVES ruling on Plaintiff's claim for prolonged arbitrary detention in violation of the Alien Tort Claims Act against Defendant Sosa pending further discussion at the pretrial conference. The Court expects to proceed to trial on Plaintiff's claims of assault, battery, and intentional infliction of emotional distress against Defendant Sosa based on his alleged conduct in Mexico and on Plaintiff's claim of intentional infliction of emotional distress against the United States based on the alleged actions of its agents in El Paso.

IT IS SO ORDERED.

DATE: 3/18/99

/s/ STEPHEN V. WILSON
STEPHEN V. WILSON
UNITED STATES DISTRICT
JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 93-4072
No. CV 93-4072 SVW (SHx)

HUMBERTO ALVAREZ-MACHAIN, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Filed: May 18, 1999

ORDER

Plaintiff's complaint included a claim for prolonged arbitrary detention, which Plaintiff sometimes dubs simply arbitrary detention, based on Plaintiff's arrest in Mexico and subsequent detention by Defendant Sosa and then United States authorities. The Court reserved a ruling on Defendant Sosa's motion for summary judgment with respect to this claim and sought further briefing. In the Court's Order of March 18, 1999, the Court reported that while it appeared that the Court would grant summary judgment for Plaintiff on the arbitrary detention claim, the Court would allow Defendant a further response. The Court also asked the parties to address the interrelation between the arbitrary detention claim and the kidnapping claim on

which the Court granted summary judgment for Plaintiff. The parties responded to the Court's Order and the Court further inquired into the matter at the hearing on May 3, 1999.

The Court's analysis of this issue in the March 18, 1999, Order relied largely in *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998). In *Martinez*, the Ninth Circuit explained that "detention is arbitrary 'if it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person.'" *Id.* (citing Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt. h (1987)). The Ninth Circuit rejected the plaintiff's claim in *Martinez* because the authorities arrested Martinez pursuant to law under a valid Mexican arrest warrant and detained him in a manner consistent with acceptable common practice. In the instant case, Defendant Sosa arrested and detained Plaintiff in Mexico without lawful authority.

Plaintiff agrees that the kidnapping claim covers the same action involved in the arbitrary detention claim. Plaintiff also asserts that any amount of time suffices to establish a claim for arbitrary detention. Plaintiff only refers to the claim as "prolonged" arbitrary detention because of the length of Plaintiff's detention in Mexico and his subsequent detention in the United States. The Court will need to establish the scope of damages for the arbitrary detention claim, as it will for the kidnapping claim. The Court discusses that issue below.

Defendant Sosa argues that an arrest without a warrant does not amount to arbitrary detention and that such a holding would create a dangerous precedent. The Court does not suggest that a lawful arrest

requires a warrant or that the lack of a warrant amounts to a lack of lawful authority. Defendant Sosa acted without lawful authority in Mexico by arresting Plaintiff on the basis of a warrant issued in the United States, but without a Mexican warrant or other consent of the Mexican government or authorities. The Court's finding that Defendant Sosa kidnapped Plaintiff establishes that Sosa detained Plaintiff without lawful authority.

Defendant Sosa also points out that the *Martinez* court considered the arrest and detention separately. Defendant Sosa correctly describes *Martinez*, but that description does not govern this case. The *Martinez* court decided that the officers made a valid arrest so the court then had to consider whether or not the length or conditions of detention made it arbitrary. In the instant case, the arrest occurred without lawful authority which makes the detention arbitrary regardless of its length or conditions.

Defendant Sosa then claims that the detention did not occur for a long enough period of time to support a cause of action. Sosa cites comment h to the Restatement which concludes: "A single, brief, arbitrary detention by an official of a state party to one of the principal international agreements might violate that agreement; arbitrary detention violates customary international law if it is prolonged and practiced as a state policy."

This concern again raises the question of the proper scope of damages. Simply put, the Court must determine whether Defendant Sosa must face liability for the entire period of time for which Plaintiff was detained in Mexico and the United States, or if Defendant Sosa's liability should cease at the point at which Sosa turned

Plaintiff over to United States authorities in El Paso. Both parties at the May 3 hearing informed the Court that the scope of damages affects the evidence which they wish to present at trial. The Court does not know how the evidentiary presentation would differ: Plaintiff has waived economic and psychological damages and the length of Plaintiff's detention could be easily established. However, the Court wants to obtain a complete record before making a decision on the damages issue. For all of these reasons, the Court: (1) DENIES Defendant Sosa's motion for summary judgment and GRANTS Plaintiff's motion for summary judgment with respect to Plaintiff's claim for arbitrary detention, as the Court suggested in its March 18, 1999 Order; (2) ORDERS both parties to proceed with evidence on the full range of potential damages at trial; and (3) RESERVES a ruling on the appropriate scope of damages for Defendant Sosa's kidnapping and arbitrary detention of Plaintiff.

IT IS SO ORDERED.

DATED: May 18, 1999

/s/ STEPHEN V. WILSON
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 93-4072 SVW (SHx)

HUMBERTO ALVAREZ-MACHAIN, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Filed: Sept. 9, 1999

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court conducted a bench trial in this case on May 19 and July 1, 1999. In the interim the Court viewed several hours of excerpts from Plaintiff's deposition and considered the briefs of the parties. After the close of the trial, the Court requested further briefing from the parties regarding damages. The record in this matter is now complete. Based on all of the evidence adduced at trial and in accord with Fed. R. Civ. P. 52(a), the Court now enters its findings of fact and conclusions of law.

I. Findings of Fact

Excerpts of Record

This action arises out of the investigation and prosecution of federal criminal offenses based upon the February 1985 kidnaping, torture and murder of Drug Enforcement Administration ("DEA") Special Agent Enrique Camarena-Salazar ("Camarena") in Guadalajara, Mexico. Numerous individuals were arrested and prosecuted, both in the United States and in Mexico, for the kidnaping, torture and murder of Camarena. *See generally, United States* v. *Caro-Quintero*, 745 F. Supp. 599, 601-02 (C.D. Cal. 1990), *aff'd*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 655 (1992).

After being abducted outside the American Consulate in Guadalajara, Mexico, Camarena was tortured and killed at a residence then owned by Rafael Caro-Quintero and located at 881 Lope de Vega, also in Guadalajara. The plaintiff Humberto Alvarez-Machain ("Alvarez" or "plaintiff") admits that he was present at this location during the time that Camarena was being held there. November 18-21, 1998 Deposition of Humberto Alvarez-Machain ("Alvarez Dep.") at 356; Plaintiff's Responses to Defendant United States Requests For Admission ("Plaintiff's Admissions (U.S.)") at ¶1.

On January 19, 1990, the Honorable Edward Rafeedie issued a warrant for the arrest of Alvarez on charges of aiding and abetting a kidnaping in violation of 18 U.S.C. §§ 1201(a)(5) and 2. Exhibit No. 211. None of the information presented to Judge Rafeedie to obtain the above-mentioned warrant was provided by defendant Jose Francisco Sosa ("Sosa"). Declaration of Jose Francisco Sosa ("Sosa Dec.") at ¶4.

In January 1990, a federal grand jury empaneled in the Central District of California was investigating the circumstances surrounding the kidnaping, torture and murder of Special Agent Camarena. On January 30, 1990, the grand jury returned a Sixth Superseding Indictment ("Indictment") charging Alvarez and others with various federal criminal violations in connection with the kidnaping and murder of Special Agent Camarena and his pilot Alfredo Zavala-Avelar. A bench warrant for the arrest of Alvarez was issued upon the return of the Indictment. Plaintiff's Statement of Genuine Issues of Material Fact in Dispute in Opposition to Defendant Sosa's Motion for Summary Judgment ("Plaintiff's Admission (Sosa)"). None of the evidence presented to the grand jury to obtain the above-mentioned Indictment was provided by Sosa. Sosa Dec. ¶ 4.

In late 1989 and early 1990, the DEA engaged in discussions with various individuals, including controlled informants and operatives then working for the DEA in the United States and Mexico, regarding an effort to apprehend Alvarez in Mexico and to return him to the United States to answer the criminal charges that had been filed against him. These discussions contemplated that the actual apprehension of Alvarez in Mexico would be carried out for the DEA by Mexican nationals. The DEA headquarters approved the use of Mexican nationals to arrest Alvarez in Mexico and to transport Alvarez to the United States. Plaintiff's Admissions (Sosa) at ¶ 5.

The DEA discussions with Mexican nationals regarding the arrest of Alvarez were conducted for the DEA by, or under the direct supervision of, DEA Special Agent Hector Berrellez ("Berrellez"), the agent

in charge of the DEA investigation of the Camarena murder in the Los Angeles Division. In conducting these discussions with the Mexican nationals, Berrellez was assisted by Antonio Garate ("Garate"), a long-time, salaried DEA operative who was a DEA employee at the time of the events in issue here. When Garate pursued his contacts in Mexico to enlist assistance in arresting Alvarez, Garate was acting on behalf of the DEA. Plaintiff's Admissions (Sosa) at ¶¶ 6-7.

One such Mexican national who was contracted by DEA for assistance in arresting Alvarez and bringing him to the United States was Ignacion or "Ignacio" Barragan ("Barragan"). Barragan was then a former Mexican law enforcement officer living in Juarez, Mexico. Garate traveled to Mexico to meet with Barragan and to discuss the plan to arrest Alvarez. Barragan agreed to recruit Mexican nationals to arrest Alvarez on behalf of the DEA. Plaintiff's Admissions (Sosa) at ¶ 8.

Sosa was born in Mexico in June 1947. In April 1990, he was 43 years old, approximately 5 feet 6 inches tall, and of average weight. At that time, Sosa had not held full time employment for a number of months. Sosa's last full-time employment position, prior to April 1990, was with a branch of the Mexican Federal Police that investigates illegal gaming and lottery activities. Sosa Dec. at ¶ 2.

In or about March 1990, Sosa was contacted by Barragan. Sosa knew that Barragan had previously served as a senior customs official in Juarez, Mexico, and believed that Barragan worked as an agent for the DEA in Mexico. Sosa Dec. at ¶ 3.

Barragan asked Sosa to participate in an operation to arrest Alvarez for the DEA. Sosa did not personally know Alvarez and, prior to his discussions with Barragan, had not previously communicated any information about Alvarez to U.S. law enforcement authorities. Barragan told Sosa that the DEA in Los Angeles had obtained a warrant for the arrest of Alvarez, and that Barragan was organizing a group to arrest Alvarez in Guadalajara, Mexico and to bring him to the United States. Barragan told Sosa that the DEA would pay the expenses of the arrest operation and, if the operation was successful, the DEA would recommend Sosa for a position with the Mexican Attorney General's Office. In his conversations with Sosa, Barragan emphasized the importance to the DEA that Alvarez-Machain not be abused or harmed during the arrest operation. Sosa Dec. at ¶ 4.

Sosa agreed to participate in the arrest of Alvarez in Mexico and to assist in delivering him to the United States. Sosa believed that he was employed with the DEA and would receive DEA direction through Barragan. Barragan instructed Sosa to travel to Guadalajara where others engaged by Barragan were gathered. Barragan provided Sosa with the name and telephone number of the point of contact in Guadalajara who, Sosa understood, was related to Barragan. Sosa does not recall the name of that individual, and refers to him as Barragan's relative. Sosa believed that Barragan's relative also was working for the DEA. Sosa Dec. at ¶¶ 5, 7.

In late March 1990, Sosa traveled to Guadalajara and there met approximately six individuals—Barragan's relative and four or five others. One of the individuals was a female and the others were males. All were

Mexican nationals. Sosa knew only one of these individuals prior to this meeting in Guadalajara, a person who also came from Mexico City named Covarrubias. Sosa Dec. at ¶ 6.

The members of the group that was formed to arrest Alvarez took direction from Barragan (by telephone), and from his relative, regarding a plan to take Alvarez into custody. In these directions, it was emphasized again that Alvarez-Machain must not be harmed during the arrest. The plan was to take Alvarez into custody at his medical office in Guadalajara at the end of the day when there were no patients present. It was further part of the plan to drive Alvarez from Guadalajara to Leon where the group would transport Alvarez by private plane to the United States. Sosa Dec. at ¶ 7.

On April 2, 1990, at about 7:00 or 8:00 at night, four or five of the men who were members of the arrest group entered the medical office of Alvarez and took him into custody. None of the men were dressed as police officers. Sosa Dec. at ¶ 8. One of the men told Alvarez that there was a warrant for Alvarez' arrest. Alvarez Dep. at 319-320. Alvarez offered no resistance at this time, or at any point while in custody in Mexico. *Id.* at 258. While the men were armed, they did not display their weapons, nor did they carry large machine guns. The Court finds Ana Maria Ibarraran Alvarez's testimony to the contrary entirely incredible as described below. Alvarez was escorted out of the medical office to a waiting car. Alvarez asked if he was being taken to the United States, but no one in the arrest group answered him at this point. There was a police station within a few blocks of the medical office. Alvarez did not cry out or attempt to draw attention to himself or

the arrest group while he was being escorted out of his office to the waiting car. Sosa Dec. at ¶ 8.

At the time of Alvarez's arrest in Guadalajara on April 2, 1990, a warrant for his arrest, issued by a judicial officer of the United States of America, was outstanding. Plaintiff's Admission (U.S.) at ¶ 17; Alvarez Dep. at 321. Plaintiff does not dispute that the warrant was supported by probable cause.

On the evening of April 2, Alvarez was driven to a house owned by Barragan's relative where he was held in custody for approximately two hours. Sosa was not present for some portions of the time that Alvarez was held at the house. Sosa Dec. at ¶¶ 9-10. Alvarez is unable to identify Sosa as being present at the Guadalajara house at all. Alvarez Dep. at 324, 326, 344-45.

Other than Alvarez' own testimony, which for the reasons explained below the Court finds not credible, there is no evidence that Alvarez was tortured or abused at the house in Guadalajara. Alvarez contends that he received an injection while in the house in Guadalajara, and Sosa subsequently overheard Alvarez and one of the other Mexican nationals speaking about an injection. Sosa Dec. at ¶¶ 10, 16. However, there is no credible evidence that an injection ever occurred. In fact, Alvarez never complained of an injection while in Mexico, Sosa Dec. at ¶ 10, or in El Paso. Meza Dec. at ¶¶ 6, 8-9; Martyak Dec. at ¶¶ 3-4. Alvarez does not contend that he was shocked, injected, or struck at any time after he left the house in Guadalajara on the night of April 2, 1990. Alvarez Dep. at 325-326, 331-32.

Alvarez was driven from Guadalajara to Silao, a small town near the Leon airport, where Alvarez was held in custody at a motel for the rest of the night of April 2,

1990 and part of the next morning. Sosa Dec. at ¶¶ 11-13; Alvarez Dep. at 334. Once at the motel in Silao, Alvarez laid down on one of the beds and used the bathroom whenever he wanted during the night. Alvarez Dep. at 335. Alvarez was offered and accepted water at the motel. *Id.* Although Alvarez did not eat at the motel, he was not denied food. *Id.* at 337-338.

At about midday on April 3, 1990, Alvarez was taken by taxicab from the Silao motel to the Leon airport. Alvarez Dep. at 338. Alvarez was met at the Leon airport by Barragan's relative and two other members of the arrest team. Sosa Dec. at ¶ 15. He was escorted through the public portion of the airport terminal, through the metal detectors, and out to the runway where a private plane was waiting. *Id.* In addition to the pilot, the plane was occupied by Alvarez, Barragan's relative, Sosa and two other members of the arrest team. The plane departed from Leon in the early afternoon of April 3, 1990. During the flight, Alvarez spoke to Barragan's relative who said that he was working for the DEA. Alvarez said that he had tried several times to contact the head DEA agent in Guadalajara but had not been successful. Sosa Dec. at ¶ 16.

The plane transporting Alvarez landed in El Paso later in the afternoon of April 3, 1990. There, Alvarez was delivered to the custody of DEA Special Agent Berrellez and others, including DEA Special Agents Reynaldo Sepulveda, Marty Martinez, and Delbert Salazar, who were waiting on the runway where the plane stopped. Sosa Dec. ¶ 17; Salazar Dec. ¶¶ 5-9; Sepulveda Dec. at ¶¶ 7-8. When Alvarez exited the plane, Agent Berrellez informed him, in the Spanish language, that he was under arrest. Salazar Dec. at ¶ 9.

Alvarez indicated that he was glad to be in the United States so that he could clear his name. Salazar Dec. at ¶ 10; Martinez Dec. at ¶ 4. The DEA agents at the airport saw no evidence that Alvarez had been hurt, reported that he walked without a limp, and noted that Alvarez acted pleasant and did not seem upset. Salazar Dec. at ¶¶ 10-11; Martinez Dec. ¶ 4; Sepulveda Dec. at ¶ 9.

Immigration and Naturalization Service ("INS") Agent Ronnie Ayers was also present to meet the plane at the El Paso airport in order to conduct the INS processing required whenever an alien enters the United States. Ayers Dec. at ¶ 6. Soon after Alvarez stepped off the plane, Ayers interviewed him on the tarmac in the Spanish language, obtaining required biographical information. *Id.* at ¶ 11. During the conversation, Alvarez was polite and accommodating, did not appear emotionally upset, and neither voiced any complaints regarding his treatment while in the custody of the arrest team nor requested food, water, or any other assistance. *Id.* Alvarez did not appear to Agent Ayers to be disheveled or abused in any way; his gait was normal and no bruises or cuts were visible on the exposed areas of his skin. *Id.* at ¶ 10.

The group who had delivered Alvarez from Mexico to El Paso, including Sosa, was required to return immediately to Mexico, and the plane carrying the group departed only a few minutes after it had landed. Sosa Dec. at ¶ 17. Sosa was not present in El Paso at any time during the events occurring during plaintiff's interrogation and confinement there during the period April 3, 1990 through April 10, 1990. *Id.* From the time that Alvarez was taken into custody at his medical offices in Guadalajara on the night of April 2, 1990, until

he was delivered into the custody of Berrellez and the other officials at the El Paso airport, less than twenty-four hours had elapsed. *Id.*; Plaintiff's Admissions (Sosa) at ¶ 27.

Shortly after arrival at the El Paso airport Alvarez was transported to the El Paso DEA offices by car. Salazar Dec. at ¶ 12. Once there, Alvarez was placed in an interview room, and read his *Miranda* rights in the Spanish language. Sepulveda Dec. at ¶¶ 10, 14. Agent Berrellez then informed Alvarez that the DEA agents wanted to ask him some questions about the Camarena kidnaping. *Id.* at ¶ 11. The interview was not confrontational, and throughout his interview at the DEA offices, Alvarez emphasized his willingness to cooperate. *Id.*; Salazar Dec. at ¶ 13; Martinez Dec. at ¶ 5; Sullivan Dec. at ¶ 5. Alvarez never reported to the agents that he had been tortured or mistreated while he was being brought from Mexico to the United States. Martinez Dec. at ¶ 6; Salazar Dec. at ¶¶ 11-13.

While at the DEA offices, Alvarez was photographed from head-to-toe to document that he had not been mistreated or tortured. Sepulveda Dec. at ¶ 13. Alvarez displayed no resistance to this process. *Id.* Agent Sullivan, who actually took the photographs, saw no cuts, scrapes, scratches, bruises, handcuff marks, or other signs that Alvarez had been injured, abused, or mistreated in any way. Sullivan Dec. at ¶ 7. Further, the developed photographs show no evidence of any external injuries. Exhibit No. 208.

Alvarez was transported to the El Paso County Jail on the night of April 3, 1990 for overnight detention. Sepulveda Dec. at ¶ 15. Agent Martinez and another agent from the DEA's El Paso office drove Alvarez to the El Paso County jail, stopping on the way to buy two

hamburgers because Alvarez indicated that he was hungry. Martinez Dec. at ¶ 7. Alvarez was turned over to the custody of officers at the El Paso County jail, where he was booked and signed in under his own name. *Id.* at ¶ 9.

On the night of April 3, 1990, Alvarez was held in the El Paso County jail pending arraignment by the federal court in El Paso. The following morning, Alvarez complained of chest pains and was taken from the El Paso County jail, by ambulance, and admitted to Thomason General Hospital in El Paso. Alvarez Dep. at 290-291.

Alvarez was a patient at Thomason General Hospital from April 4 to April 6, 1990. Meza Dec. at ¶¶ 6-7. During that time he was examined and attended to by doctors and nurses who communicated with Alvarez in the Spanish language. Alvarez Dep. at 292, 294-295. Alvarez was able to communicate with the Thomason medical staff whenever he needed medication or to report a particular pain or problem. *Id.* at 300. Dr. Armando Meza was one of the physicians who examined and treated Alvarez, and who spoke to Alvarez in the Spanish language. Meza Dec. at ¶¶ 5-6. Dr. Meza impressed Alvarez with his skill and knowledge. Alvarez Dep. at 297. Alvarez never reported to anyone at Thomason General Hospital that he had been shocked, injected or abused during and following his arrest in Guadalajara on April 2, 1990. Alvarez Dep. at 287, 309.

On April 5, 1990, at 4:30 p.m., federal district judge Emilio M. Garza commenced an arraignment hearing, with the assistance of a Spanish language interpreter, at Alvarez' bedside at Thomason General Hospital. April 5, 1990 Hearing Transcript ("Hr'g. Tr."), Exhibit No. 230. After the reading of the Indictment had

begun, and Judge Garza had entered a plea of "not guilty" on all counts of the Indictment, the hearing was adjourned when Alvarez reported that he was feeling too ill to proceed with the hearing. *Id.* Alvarez never reported during this April 5 hearing that he had been shocked, injected or abused during and following his arrest in Guadalajara on April 2, 1990. *Id.*; Alvarez Dep. at 287, 309.

On April 6, 1990, Alvarez was released from Thomason General Hospital and transferred to the infirmary at La Tuna Federal Corrections Institute ("La Tuna") in El Paso. Alvarez Dep. at 302. Alvarez was a patient at the La Tuna infirmary from April 6 to April 10, 1990. Martyak Dec. at ¶¶ 3-4. During that time he was examined and attended to by doctors and nurses, including Dr. Thomas Martyak. *Id.* The La Tuna medical personnel communicated with Alvarez in the Spanish language. *Id.*, Hubble Dec. at ¶¶ 5-6. Alvarez never reported to anyone at La Tuna that he had been shocked, injected or abused during and following his arrest in Guadalajara on April 2, 1990. Martyak Dec. at ¶¶ 3-4; Alvarez Dep. at 287, 309.

On April 9, 1990, at the La Tuna infirmary, federal district judge Emilio M. Garza presided over the reading of the Indictment, the acceptance of Alvarez' plea of not guilty, and a hearing that established the identity of the accused as the Humberto Alvarez-Machain named in the indictment. April 9, 1990 Hr'g. Tr., Exhibit No. 231; Alvarez Dep. at 306-309. Alvarez never reported during this April 9 hearing that he had been shocked, injected or abused during and following his arrest in Guadalajara on April 2, 1990. Alvarez Dep. at 287, 307-309.

Alvarez was transported by United States Marshals from El Paso to Los Angeles where he appeared before Judge Rafeedie on April 10, 1990. At that time the Court conducted a detention hearing and entered an order that Alvarez be held without bond pending trial. April 10, 1990 Hr'g. Tr., Exhibit No. 232. During the April 10 hearing, Alvarez addressed Judge Rafeedie, but Alvarez did not report during that hearing that he had been shocked, injected or abused during and following his arrest in Guadalajara on April 2, 1990. *Id.* at 19.

On April 19, 1990, Alvarez appeared again before Judge Rafeedie. On this occasion, the Court conducted a motions hearing which also was attended by co-defendant Juan Matta-Balesteros. Alvarez Dep. at 313-317. During this hearing, Alvarez conceded that he may have heard Matta-Ballesteros' claim that he had been mistreated, and shocked with an electrical device, when he was brought to the United States. *Id.* at 316-317. It has previously been found that Alvarez was, in fact, present in the courtroom when Matta-Ballesteros made these claims of mistreatment. October 19, 1992 Hr'g. Tr., Exhibit No. 233.

On May 25, 1990 Judge Rafeedie conducted an evidentiary hearing on Alvarez' motion to dismiss the Indictment for outrageous government conduct and for lack of personal jurisdiction on the ground that the manner in which his presence was secured allegedly violated the extradition treaty between the United States and Mexico. At that hearing, Judge Rafeedie heard testimony from a number of witnesses, including Alvarez. Alvarez testified regarding the torture and abuse to which he was allegedly subjected when taken into custody in Mexico. On August 10, 1990, Judge

Rafeedie entered an Order which rejected Alvarez' claims of torture and abuse as "not worthy of belief" and "simply not credible." *United States* v. *Caro-Quintero*, 745 F. Supp. at 605-06. During a later proceeding in the case Judge Rafeedie, referring to the basis for his August 10, 1990 ruling, described Alvarez' allegations of mistreatment as completely contrived and adoptive of similar allegations that had been made by co-defendant Matta-Ballesteros. October 19, 1992 Hr'g. Tr., Exhibit No. 233. The August 10, 1990 Order, however, did direct that Alvarez be returned to Mexico on the ground that the seizure of Alvarez in Mexico violated the U.S.-Mexico extradition treaty. *Caro-Quintero*, 745 F. Supp. at 614.

On the appeal of the United States, the Order of the district court dismissing the Indictment was affirmed by the Ninth Circuit. *United States* v. *Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991). However, the Supreme Court granted the government's petition for certiorari and reversed. The Court held that the arrest of Alvarez by Mexican nationals acting on behalf of U.S. law enforcement officials did not violate the U.S.-Mexico Extradition Treaty, and did not deprive the district court of jurisdiction. *United States* v. *Alvarez-Machain*, 504 U.S. 655 (1992).

On remand from the Supreme Court, Alvarez renewed his allegations of torture and abuse in applying to the Ninth Circuit to dismiss the Indictment on grounds of outrageous and shocking government conduct. The Ninth Circuit denied Alvarez' application, holding that the findings of the district court—that the allegations of torture and abuse were not credible—precluded the claim that the circumstances of Alvarez' "kidnaping" were outrageous or shocking. *United*

States v. *Alvarez-Machain*, 971 F.2d 310, 311 (9th Cir. 1992).

The trial of Alvarez and his co-defendant Ruben Zuno-Arce commenced on December 1, 1992. On December 14, 1992, following the presentation of the government's case, Judge Rafeedie dismissed all charges pending against Alvarez pursuant to Fed. R. Crim. P. 29(a) and ordered Alvarez discharged from custody the following day.

Findings

The Court finds that the record evidence set forth above is credible and reliable, and the Court hereby adopts this evidence as its findings of fact as if fully set forth herein.

Alvarez recalls who Sosa is and that Sosa testified at a pretrial hearing in Alvarez' criminal case. Alvarez Dep. at 344. Alvarez is unable to identify Sosa as one of the individuals who, Alvarez alleges, shocked and injected Alvarez, pointed a gun at or otherwise assaulted Alvarez, or threatened him. *Id.* at 344-345. Alvarez is unable to identify Sosa even as someone who may have touched Alvarez gently on any part of his person during the time that Alvarez was in custody in Mexico in April 1990. *Id.* at 345.

There is no credible evidence that Sosa ever pointed a gun at Alvarez, struck or applied force of any kind to Alvarez, threatened Alvarez, or questioned or interrogated Alvarez about his involvement in the Camarena murder or in any other wrongdoing. There is no credible evidence that Sosa ever applied an electric shock apparatus to Alvarez, or injected him, or that anyone else mistreated or threatened Alvarez. There is no evidence in the record that Sosa, or any of the other

members of the arrest team in Mexico, ever interrogated plaintiff, or even mentioned the Camarena matter, during the time that plaintiff was in their custody in Mexico.

The Court did not find plaintiff to be a credible witness. Plaintiff declined to appear personally to testify, and presented his version of events through videotaped deposition testimony. Plaintiff's demeanor, as observed by the Court via the videotaped deposition, simply was not credible.[1]

That plaintiff is not a believable witness was confirmed by the numerous instances that plaintiff lied during his deposition, including lies—later admitted by Alvarez—regarding the absence of any marital problems, Alvarez Dep. at 186-87; the duration of his separation from his wife, *id.* at 194-95; the reason why his wife was living in the United States, *id.* at 361-62; his knowledge of his wife's statements to the press regarding plaintiff's relations with narco-traffickers and the Alvarez' marital problems, *id.* at 362, 368-69; the passage of time since his wife's last visit to the United States, *id.* at 369-70; and plaintiff's knowledge

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[1] The Court can and does take into account plaintiff's failure to testify in person at trial in determining the weight to give plaintiff's testimony. *Glaverbel Societe Anonyme* v. *Northlake Marketing and Supply, Inc.*, 139 F.R.D. 368, 370 (N.D. Ind. 1991). Discounting plaintiff's version of events because of his failure to testify in person at trial is particularly appropriate, given his admitted belief that he could testify falsely outside the United States and not be subject to punishment for such false testimony. Alvarez Dep. at 391-92. Although the Court could consider this evidence in discounting Plaintiff's testimony, the court does not rely on this as a basis for rejecting Plaintiff's testimony. Rather Plaintiff's unconvincing deposition testimony caused the Court to disbelieve Plaintiff.

of cocaine possession by Caro-Quintero or other evidence of his narco-trafficking activities. *Id.* at 394-96. Plaintiff also has attempted to mislead the Court in sworn declarations he has submitted. In a sworn declaration, Plaintiff claimed he did not report the alleged torture by his captors to the staff at La Tuna because none of the medical personnel there spoke Spanish. September 18, 1992 Alvarez Dec., Exhibit No. 237 at ¶ 33. In fact, Dr. Martyak spoke to plaintiff at La Tuna through a Spanish language interpreter, Martyak Dec. at ¶ 3, and numerous members of the La Tuna staff at the time were bilingual. Hubble Dec. at ¶¶ 5-6.

The Court does not believe plaintiff's testimony regarding his allegations of mistreatment. As explained above, the Court generally found plaintiff's testimony incredible even without considering the other impeaching factors discussed above.

In addition, plaintiff's testimony was contradicted by other evidence and, in many instances, was inconsistent with common sense and human experience. For example, plaintiff's testimony that one of his captors pointed a gun at plaintiff's head in his medical office, Alvarez Dep. at 541, is not credible for a variety of reasons. Plaintiff has conceded that he offered no resistance when the men directed that he go with them, *see* ¶ 14 above, and there is evidence of record that a police station was located nearby plaintiff's medical office. *Id.* The use of a weapon in these circumstances would not be necessary or logical. Moreover, even plaintiff's niece, whose declaration conflicts with plaintiff's in other material respects, does not corroborate plaintiff's claim that one of the men put a gun to plaintiff's head when they took him into custody. Ibarraran Alvarez Dec. at p. 2. As mentioned above,

the Court finds Ms. Ibarraran Alvarez's testimony entirely incredible and disbelieves her testimony that the men carried large weapons, brandished weapons in plaintiff's office, or carried large weapons with them into the street.

The Court also rejects plaintiff's testimony that he was punched in the stomach by Covarrubias while exiting the car outside the house to which plaintiff was taken in Guadalajara, Alvarez Dep. at 331, 544. Again, Plaintiff has conceded that he offered no resistance at any time that he was in the custody of the men who seized him, *see* ¶ 14 above, and thus the use of such force against plaintiff would have been unnecessary. Moreover, it would have been illogical for members of the arrest team to assault plaintiff *in public* and thereby risk calling attention to the arrest operation.

The Court also rejects plaintiff's testimony that he was shocked with an electrical device and injected while in the house in Guadalajara, or anywhere else in Mexico. First, plaintiff cannot identify any motive for such gratuitous violence in circumstances where he never resisted his captors, *see* ¶ 14 above, and was never interrogated by them. Indeed, it is counter-intuitive that Alvarez would have been subjected to such mistreatment where the Mexican nationals had received specific instructions not to harm Alvarez, and the reimbursement of their expense and any potential reward would be dependent upon compliance with those instructions. Second, there is no physical evidence of abuse to corroborate plaintiff's claim. Rather, the consistent and credible testimony of multiple witnesses who observed Alvarez upon his arrival in El Paso is that his appearance and demeanor were inconsistent with the kind of abuse Alvarez has alleged.

Third, plaintiff made no report of abuse or mistreatment when he sought and received medical treatment in El Paso. Fourth, plaintiff never claimed that he was abused until well after he arrived in Los Angeles, and after he had the opportunity to hear such claims of mistreatment being advanced by a co-defendant. Fifth, the Court finds plaintiff incredible as a witness based on its perception of plaintiff's deposition testimony.

In considering these particular allegations, the Court credits the testimony of Dr. Armando Meza that he examined plaintiff carefully at Thomason General Hospital shortly after plaintiff's arrival in El Paso, found no evidence of abuse, and received no report from the patient that any such abuse had occurred. Meza Dec. at ¶¶ 5-10. Moreover, Dr. Meza's testimony that he spoke to plaintiff in his native language, and that many members of the hospital staff who administered to plaintiff also were bilingual, shows that plaintiff had ample opportunity to report to his caretakers any abuse or injury he had incurred. *Id.* Indeed, plaintiff even admitted he was impressed with Dr. Meza's skill and knowledge. Alvarez Dep. at 297. Thus, there was no legitimate reason for plaintiff not to confide in Dr. Meza. The Court also credits the testimony of Dr. Thomas Martyak and Physician's Assistant Kenton Hubble regarding the treatment of plaintiff at La Tuna infirmary from April 6-10, 1990. Martyak Dec. at ¶¶ 3-4; Hubble Dec. at ¶¶ 3-6. This testimony also demonstrates the absence of any physical evidence of abuse, and shows the ample opportunity plaintiff had to report any alleged abuse to his bilingual caregivers.

The Court also believes it is significant that plaintiff made no report about the alleged abuse to *anyone*, including his own lawyers, until well after his arrival in

Los Angeles. Plaintiff was represented by counsel, including a Spanish-speaking attorney, at his arraignment in El Paso. April 9, 1990 Hr'g. Tr., Exhibit No. 231. Plaintiff also spoke with his appointed counsel prior to his initial hearing in Los Angeles. April 10, 1990 Hr'g. Tr., Exhibit No. 232. Indeed, plaintiff even addressed the Court directly during that initial appearance. *Id.* at 19. Yet, plaintiff concedes, it may have been as long as several weeks after his arrival in Los Angeles that he first told his own lawyer about the alleged abuse in Mexico. Alvarez Dep. at 309, 313-14. By this time, of course, plaintiff would have become aware of the allegations of mistreatment being made by his co-defendant Matta-Ballesteros. Oct. 19, 1992 Hr'g. Tr. at 60, Exhibit No. 233; Alvarez Dep. at 315-317. Even plaintiff acknowledges that his initial report to his lawyer of the alleged abuse in Mexico may not have been made until after plaintiff had learned of his co-defendant's allegations of abuse. Alvarez Dep. at 313. In these circumstances, the court finds that plaintiff's allegation of mistreatment are adoptive of the allegations made by Matta-Ballesteros, and are completely contrived.

II. Conclusions of Law

The Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1346, and 1350. Plaintiff only had four claims remaining at the time of trial: (1) kidnaping, (4) arbitrary detention, (6) assault and battery, and (8) intentional infliction of emotional distress. The Court previously granted summary judgment in Plaintiff's favor on the kidnaping and arbitrary detention claims. *See* March 18, 1999 and May 18, 1999 Order. Accordingly, the Court need only resolve the issue of damages on those claims.

For the reasons outlined above, the Court FINDS for Defendant Sosa on Plaintiff's sixth cause of action for assault and battery. The Court FINDS that Plaintiff did not suffer any assault or battery from the time of his seizure in his office in Guadalajara until his delivery to United States officials in El Paso.[2]

In addition, the Court FINDS for Defendant Sosa on Plaintiff's eighth cause of action for intentional infliction of emotional distress. The Court rejects Plaintiff's claims of abuse in Mexico, and the Court previously concluded that California law would immunize Defendant for the emotional distress based on the arrest itself. *See* March 19, 1999 Order. As discussed in note two, Plaintiff will already recover for the kidnaping and detention, including a fuller panoply of potential damages, through his Alien Tort Claims Act causes of action.[3]

The Court must now turn to a discussion of the proper damages under the Alien Tort Claims Act. The Court has two major areas to discuss in fashioning a remedy. First, as the Court announced at the beginning of the trial in this matter, Defendant Sosa only faces liability for the period from Plaintiff's kidnaping in Mexico until Defendant and others delivered Plaintiff to

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[2] As the Court noted in its March 18, 1999 Order at note 39, the Court concludes that the simple amount of force to effectuate the arrest does not establish liability for assault and battery. In addition, as with Plaintiff's eighth claim below, Plaintiff will recover for the entirety of the conduct involved in his kidnaping through damages based on his first and fourth claims.

[3] In fact, Plaintiff's post trial damages brief does not even pursue his common law claims (six and eight). *See* Plaintiff's Supplemental Trial Memorandum Re Measure of Damages (seeking damages only under the Alien Tort Claims Act).

the authorities in the United States. Second, the Court must determine what law of damages to apply to that period and establish the proper amount of compensatory and, if applicable, punitive damages.

A. Defendant Sosa's Liability Stopped at the U.S. Border

After the Court granted summary judgment in Plaintiff's favor with respect to the kidnaping and arbitrary detention claims, the parties each briefed the issue of the scope of damages. Plaintiff claimed that Defendant Sosa's actions led to Plaintiff's detention in the United States for a significant period of time and that Plaintiff should receive a damage award which covers the entire period. Defendant countered that damages should cease at the time Defendant turned Plaintiff over to United States authorities in El Paso because at that point the actions of domestic law enforcement broke the chain of causation and created an independent basis for Plaintiff's detention. At the start of the Court trial on May 19, 1999, the Court announced its agreement with Defendant's view and limited damages to the point at which domestic law enforcement took Plaintiff into custody.

The facts of this case raise troubling questions in attempting to fashion a remedy. The parties analyze the issue by examining false imprisonment cases. The Court agrees that those cases provide some insight into the scope of damages. However, two unique factors of this case limit the utility of the false imprisonment model—and these two factors lead in opposite directions.

On the one hand, Defendant Sosa cannot argue that Plaintiff's imprisonment and trial in the United States were unforeseeable. There were, in fact, the clearly

foreseeable results of his actions. Defendant Sosa knew that United States authorities would arrest, indict, and attempt to try Plaintiff upon Plaintiff's arrival in this country because that was the very reason that the United States hired Sosa in the first place.

On the other hand, none of Defendant Sosa's actions served as a basis for Plaintiff's detention and subsequent trial. In the traditional false arrest case, the defendant misleads the police or the prosecuting attorney and thereby causes an improper arrest and prosecution. By contrast, Defendant Sosa did not provide information which led to Plaintiff's arrest. Instead, domestic authorities had already obtained a valid indictment and arrest warrant at the time of Plaintiff's arrival.

Together, these facts present a very anomalous situation: the government could not have arrested and tried Plaintiff without Sosa's assistance in bringing Plaintiff to the United States, but the United States would have arrested Plaintiff as soon as he arrived in the country regardless of who brought him here or what that individual told the authorities.

The Court agrees with Defendant that, in this situation, the lawful arrest warrant and indictment broke the chain of causation from Defendant's actions to Plaintiff's continuing injuries. Federal cases dealing with false arrest and imprisonment establish this principle. In an early case, the Ninth Circuit explained that

> Filing of a criminal complaint immunizes investigating officers such as the appellants from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised indepen-

> dent judgment in determining that probable cause for an accused's arrest exists at that time. This presumption may be rebutted, however. For example, a showing that the district attorney was pressured or cause by the investigating officers to act contrary to his independent judgment will rebut the presumption and remove the immunity. Also the presentation by the officers to the district attorney of information known by them to be false will rebut the presumption. These examples are not intended to be exclusive. Perhaps the presumption may be rebutted in other ways.
>
> . . . Authorities from other circuits lend some support for this position. Thus it has been held that the filing of charges under certain circumstances does break the chain of causation between an arrest and prosecution.

Smiddy v. *Varney*, 665 F.2d 261, 266-67 (9th Cir. 1981) ("*Smiddy I*") (citation omitted). The Eleventh Circuit focused on this causation analysis in *Barts* v. *Joyner*, 865 F.2d 1187 (1989). In *Barts*, the court commented that "[w]e reject Plaintiff's contention that she is entitled to damages for her criminal trials, conviction, incarceration, and the resulting aggravation of her Rape Trauma Syndrome. The intervening acts of the prosecutor, grand jury, judge and jury—assuming that these court officials acted without malice that caused them to abuse their powers—each break the chain of causation unless plaintiff can show that these intervening acts were the result of deception or undue pressure by the defendant policemen." *Id.* at 1195.

A number of other courts have reached this result. *See Reed* v. *City of Chicago*, 77 F.3d 1049, 1053 (7th Cir.

1996) (finding that indictment broke the chain of causation from actions of detectives); *Ames* v. *United States*, 600 F.2d 183, 185 (8th Cir. 1979) (holding that grand jury indictment breaks chain of causation); *Dellums* v. *Powell*, 566 F.2d 167, 192 (D.C. Cir. 1977) (noting that independent prosecutorial decision breaks chain of causation); *Rodriguez* v. *Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977) (en banc) (explaining that decision of magistrate or grand jury breaks causal chain); *Dabbs* v. *State*, 59 N.Y.2d 213, 218 (1983) (holding that damages for false imprisonment cease at arraignment); *Barnes* v. *District of Columbia*, 452 A.2d 1198 (D.C. 1982) (disallowing a claim for attorney's fees from defending the underlying action in a suit for false arrest and imprisonment).

The most recent California Supreme Court case on the subject appears to reach a similar conclusion. *Asgari* v. *City of Los Angeles*, 63 Cal. Rptr. 2d 842 (Cal. 1997). Asgari, a former Iranian wrestler, defected to the United States. Before the Olympic trials, in which he had a significant chance of succeeding, the police arrested him for possession for sale of one pound of heroin. Ultimately, Asgari won an acquittal; nevertheless, he spent seven months and six days in jail and missed the Olympic trials. After his acquittal, Asgari sued for false imprisonment and obtained a verdict of over one million dollars. The *Asgari* court explained that

> Plaintiff contends that his false imprisonment "continued from the date of his arrest to the date of his release from prison" more than seven months later. That is incorrect. Plaintiff's false imprisonment ended when he was arraigned in municipal court on the felony complaint seven days after he was arrested. At that point, plaintiff's confinement was

> pursuant to lawful process and no longer constituted false imprisonment.

Id. at 850.

Reese v. *Geneva Enterprises*, 1997 WL 214864 (D.D.C.), used the same causation analysis in a situation conceptually similar to the one at bar. In *Reese*, the government suspected that automobile dealerships in the Washington, D.C., area had assisted drug dealers in laundering money. A sting operation led to the prosecution of several of the employees of the Geneva Enterprises dealership. One employee, after obtaining his acquittal, sued Geneva because he felt that "Geneva believed that the undercover officer was a drug dealer, but nonetheless referred the officer to him as a legitimate customer without warning him." *Id.* at *1. The *Reese* court held that Reese could not establish proximate causation between Geneva's conduct and the damages Reese suffered from his prosecution. The court, citing *Dellums*, explained that "the grand jury's indictment of Reese was an independent event which broke any causal connection between Geneva's actions and Reese's injury. Thus, Reese is unable to demonstrate, as he must, that Geneva's actions proximately caused his injury." *Id.* at *8.

The *Reese* court added:

> Reese argues that Geneva's conduct was the "but for" cause of his damages: "without Geneva's conduct, no indictment of Reese would ever have taken place." However "but for" causation is only one element of the proximate cause which must be shown to hold a defendant liable for injuries caused by his conduct. The proximate cause of an injury "is one which, in its natural and continual sequence, un-

> broken by any efficient intervening cause, produces the injury and without which the result would not have occurred."

Id. at *8 (citations omitted).

Plaintiff resists these cases on two grounds. First, he claims that the cases almost always involve law enforcement officers and thus the decisions really rely on immunity, not causation. Second, Plaintiff offers other false imprisonment cases in which plaintiffs recovered damages for the entire length of their detention. The Court will deal with these arguments in turn.

Plaintiff is correct that many of the cases cited above rely on the idea of official immunity for police officers. In *Asgari*, for example, the Court explicitly dealt with statutory immunity and the broader language cited above might represent mere dicta. However, in the relevant footnote in the opinion, the *Asgari* Court cited a New York case, *Broughton* v. *State*, 37 N.Y.2d 451, 459 (N.Y. 1975), which does not rely on the concept of immunity at all. This suggests that the California Supreme Court would apply the *Asgari* rationale more broadly. Similarly, in *Smiddy I*, the Ninth Circuit explicitly mentioned the need to protect police officers. Nevertheless, the court used the language of causation, not solely immunity, to explain its result.

Plaintiff fails to account for the other cases discussed above. While some cases such as *Smiddy I* and *Asgari* do include discussions of immunity, other cases explicitly rely on the lack of causation. In *Barts*, for example, one section of the Eleventh Circuit's opinion dealt with immunity. In a later section, entitled "Damages," the court held that damages ceased at the point of an independent decision of a prosecutor or grand jury. In

Jones v. *City of Chicago*, 856 F.2d 985 (7th Cir. 1988), the court discussed the concept of immunity and causation together:

> "a man [is] responsible for the natural consequences of his actions." This principle led the Supreme Court in *Malley* v. *Briggs*, to hold that the issuance of an arrest warrant will not shield the police officer who applied for the warrant from liability for false arrest if "a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." The Court was speaking of immunity but its discussion is equally relevant to causation, as indeed is implied in a footnote to the Court's opinion.

Id. at 993-94 (citations omitted). The Court concludes that persuasive authority exists for the proposition that the independent act of charging authorities breaks the chain of causation such that damages cease to accrue with respect to the individual who made or caused the arrest.[4]

Plaintiff's citation to other cases does not convince the Court that Plaintiff should recover from Defendant Sosa for Plaintiff's entire detention. Plaintiff offers a number of older state cases in which courts allowed recovery for damages for the entire period of detention. In some of those cases the actions of the defendants led to a period of incarceration before any sort of independent hearing. *See, e.g.*, *Collins* v. *Jones*, 131 Cal. App. 747, 753 (1933) (observing "no showing nor is there a claim made that any person had the right or authority

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[4] In this case, that decision occurred, as reflected in the indictment and arrest warrant, before Plaintiff's kidnaping in Mexico.

to release plaintiff before a hearing after she was once detained by order of the defendant"); *Kenyon* v. *Hartford Accident & Indem. Co.*, 86 Cal. App. 269, 273 (1927). In those situations, the Court agrees that a plaintiff should recover for the length of detention, and other damages which arise during that detention, because no independent decision broke the causal chain. However, to the extent that Plaintiff offers any case which suggests recovery for a period of time after the independent decision of a prosecutor or grand jury, the Court follows the number of more recent and better reasoned federal cases on this point.

Plaintiff's case presents a truly unique situation. The Court does not condone Defendant Sosa's actions which the Court has already found to have violated international law. Nevertheless, the Court cannot conclude that Plaintiff can recover damages against Sosa for Plaintiff's entire detention in the United States. As the Court noted at the outset, Defendant Sosa took no action which caused Plaintiff's arrest. In the typical false arrest case, a police officer arrests an individual without probable cause or a private citizen provides false or misleading information to the police which causes an arrest. This case stands one step removed from that situation because domestic law enforcement officers performed a lawful arrest based on a valid warrant and indictment. Defendant Sosa certainly made the arrest possible by bringing Plaintiff to the United States, but the arrest and detention occurred for entirely independent, and lawful, reasons.

The Court also notes that Plaintiff's view of the law creates the potential for highly inequitable results. Under Plaintiff's analysis, had Plaintiff been convicted and sentenced to a long term of incarceration, perhaps

even a life sentence, Plaintiff would recover damages from Defendant Sosa for each day Plaintiff served pursuant to a validly imposed sentence.

For all of the reasons outlined above, and as described at the May 19, 1999, trial, the Court LIMITS the scope of Plaintiff's damages to the events up to the point at which United States authorities took Plaintiff into custody in El Paso pursuant to a valid warrant and indictment.

B. Establishing a Proper Amount of Damages

Defendant Sosa concedes, as he must, that he faces liability for kidnaping and arbitrary detention in violation of international law under the Alien Tort Claims Act. *See* March 18, 1999 and May 18, 1999 Orders. Instead, Defendant Sosa argues that Mexican law should govern the damages measure in this case because the events occurred in Mexico. Defendant Sosa also claims that if the Court does not apply Mexican law, it should at least reject the imposition of punitive damages under the Alien Tort Claims Act for a variety of reasons. Plaintiff concedes that Mexican law would apply in a case not brought under the Alien Tort Claims Act and that such law would drastically limit the available damages. *See* Plaintiff's Supplemental Trial Memorandum Re Measure of Damages at 1 n.1. Thus the Court must initially determine what law to apply and then consider the appropriate damage measure.

The Eleventh Circuit has explained that "the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law. Congress, of course, may enact a statute that confers on the federal courts jurisdiction over a particular class of

cases while delegating to the courts the tasks of fashioning remedies that give effect to the federal policies underlying the statute." *Abebe-Jira* v. *Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (citations omitted). *See also Filartiga* v. *Pena-Irala*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984) (*Filartiga II*).

The Court declines to apply the Mexican law of damages to this action. While the events at issue took place in Mexico between, for purposes of this stage of the suit, two Mexican citizens, the Court finds that the application of Mexican law would "inhibit the appropriate enforcement of the applicable international law or conflict with the public policy of the United States." *Filartiga II*, 577 F. Supp. at 864. Judge Nickerson considered exactly this situation on remand from the Second Circuit after that court's landmark decision in *Filartiga*, 630 F.2d 876 (2d Cir. 1980). In *Filartiga II*, Judge Nickerson first looked to Paraguayan law to determine a remedy and concluded that Paraguayan law, with its damages limitations, did not provide an appropriate measure of damages. 577 F. Supp. at 864. Earlier in the opinion, Judge Nickerson commented that "there is no basis for adopting a narrow interpretation of Section 1350 inviting frustration of the purposes of international law by individual states that enact immunities for government personnel or other such exemptions or limitations." *Id.* at 863.

The Court finds the same analysis relevant in this case: Mexican law would cap the amount of damages and prevent the consideration of punitive damages. Defendant Sosa's position would hold that even if Defendant had held Plaintiff for a period of ten years, Plaintiff could recover no more than fifty or one hundred thousand pesos. The Court concludes that the use

of federal common law remedies, including the possibility of punitive damages, best serves the ends of the Alien Tort Claims Act. The Court's reading also follows the limited case law on this subject: courts routinely apply federal common law and consider punitive damages in section 1350 suits. *See, e.g.*, *Abebe-Jira*, 72 F.3d at 848; *Paul* v. *Avril*, 901 F. Supp. 330 (S.D. Fla. 1994); *Xuncax* v. *Gramajo*, 886 F. Supp. 162, 198 (D. Mass. 1995).[5]

The Court must now determine an appropriate amount of compensatory damages and evaluate whether or not to impose punitive damages.

Compensatory Damages

Plaintiff seeks $150,000 in compensatory damages and cites several cases from Section 1983 litigation to suggest the propriety of such an amount. Defendant counters that the amounts in the cases cited by Plaintiff relied on significantly greater showings of emotional distress. As discussed in the findings of fact, the Court concluded that Plaintiff did not experience any mistreatment during his approximately twenty hours in custody in Mexico and Plaintiff provides little evidence about his emotional distress.[6] Plaintiff knew, relatively

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[5] Defendant Sosa points out that the Ninth Circuit allowed the application of the damages law of the Philippines in *Hilao* v. *Estate of Marcos*, 103 F.3d 767, 780 (9th Cir. 1996). However, the Ninth Circuit did not squarely address the question of the appropriate law to apply in that case. In addition, this Court's conclusion comports with the Ninth Circuit's action in *Marcos*: there, Philippine law allowed exemplary damages, and its application did not frustrate the remedial purposes of the Alien Tort Claims Act.

[6] As noted previously, Plaintiff has waived all of his claims for damages, such as economic, except for his emotional distress from the events at issue.

quickly after his seizure, that his captors were transporting him to the United States. However, the fact remains that Defendant seized Plaintiff in Mexico and held him for a period of twenty hours. Despite the fact that Plaintiff failed to adduce any tangible proof of emotional distress, the Court does not doubt that a kidnaping would produce such distress. Accordingly, the Court, based on the evidence in this case, AWARDS Plaintiff compensatory damages in the amount of $25,000.

Punitive Damages

Defendant Sosa contends that even if punitive damages are available under the Alien Tort Claims Act for kidnaping and arbitrary detention, the Court should not impose such damages in this case. Defendant makes two arguments. First, Defendant argues that the Court should not impose punitive damages because the issue of Plaintiff's claims under the Alien Tort Claims Act presented one of first impression. Second, under federal and California law, Defendant claims that Plaintiff must prove that: (1) Defendant's conduct was sufficient to support a punitive sanction; (2) the sanction would deter Defendant, especially light of Defendant's financial condition; and (3) the punitive damages bear a reasonable relationship to the injury actually suffered. Plaintiff counters that Defendant knew that his conduct violated the law and that Defendant did so for personal gain.

The Court agrees with Defendant's position and declines to impose punitive damages even though the Courts recognizes its ability to do so. As an initial matter, the Court agrees with Defendant that punitive damages are not appropriate in this case of first impres-

sion. As the Court previously noted, no United States court has ever recognized kidnaping as a cognizable claim under the Alien Tort Claims Act and only a few courts have considered arbitrary detention claims under very different circumstances. The Ninth Circuit and California courts have decided that punitive damage awards are inappropriate when the case involves an issue of first impression or a newly established right. *See, e.g., Waits* v. *Frito-Lay, Inc.*, 978 F.2d 1093, 1104 (9th Cir. 1992).

This Court's previous Order recognizing a consensus in international law against kidnaping and transborder abduction, *see* March 18, 1999 Order, does not counsel a different result. International law does clearly prohibit transborder abductions. However, Defendant Sosa believed that his actions were valid under United States law, even if he knew that his actions were impermissible in Mexico. Plaintiff did not provide any evidence of Defendant's knowledge of international law on this point. Because of the unsettled state of the law, Defendant Sosa did not have a clear warning of the impropriety of his conduct. For this reason, Plaintiff cannot demonstrate malice or oppression by Defendant Sosa.

In addition, kidnaping and arbitrary detention are not violations of *jus cogens* norms. *See* March 18, 1999 Order. While may courts have imposed punitive damage awards for violations under the Alien Tort Claims Act, those cases have involved the basest of human conduct such as murder, torture, and slavery. The Court does not mean to suggest that transborder abductions are ever permissible instruments of policy, but the Court thinks it obvious that abductions do not offend traditional human decency to the same degree as murder or torture. In sum, while the Court recognizes

that the Alien Tort Claims Act would allow the imposition of punitive damages—and that such damages might be properly imposed with respect to kidnapings in the future—the Court feels that punitive damages are inappropriate in the first case raising the issue.

Independently, the Court finds that the particular facts of this case justify rejecting the imposition of punitive damages. First, Defendant Sosa's conduct, while impermissible and in violation of international law, does not justify punitive damages. Defendant Sosa did violate the law for personal gain. However, Defendant Sosa did so at the urging of the United States government under the belief that his action was lawful based on a warrant and indictment in the United States. Defendant Sosa did not instigate the plan to kidnap Plaintiff, nor was he an important player in the execution of the plan. In fact, Defendant Sosa was one of a team of individuals hired as a second choice to carry out the plan.

Second, punitive damages would not have a deterrent effect. Defendant Sosa need not be deterred. He is now living in the United States as part of the witness protection program and earning a modest amount of money.[7] He cannot return to his home country of Mexico, nor can he even decide where to live within the United States. Punishing Defendant Sosa is also not likely to deter others. It could be that a punitive damage award against Defendant would make low level

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[7] In fact, while the Court does not have any competent evidence of Defendant Sosa's financial situation, it seems clear that any imposition of punitive damages would create too significant a financial burden. *See, e.g., Adams* v. *Murakami*, 54 Cal. 3d 105, 119 (1991).

actors here and abroad think twice before participating in such activities in the future. However, the driving force behind the unfortunate events of this case was the United States. A damage award against the United States provides the only real hope of deterrence, but the Court's prior Order forecloses that possibility.

III. Conclusion

For all the reasons outlined above, the Court FINDS for Defendant Sosa on Plaintiff's sixth and eighth causes of action and AWARDS Plaintiff damages on his first and fourth causes of action in the amount of $25,000.

IT IS SO ORDERED.

DATED: 9/9/99

/s/ STEPHEN V. WILSON
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. CV 93-4072 SVW (SHx)

HUMBERTO ALVAREZ-MACHAIN, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Filed: Sept. 23, 1999

[PROPOSED] AMENDED JUDGMENT

Having considered the parties' Joint Stipulation to Alter or Amend Judgment, it is ORDERED that JUDGMENT be entered against plaintiff and in favor of defendants the United States, Jack Lawn, Peter Gruden, William Waters, Hector Berrellez and Antonio Garate-Bustamante, dismissing this action with prejudice.

It is FURTHER ORDERED that JUDGMENT be entered in favor of plaintiff and against defendant Franciso Sosa in the first and fourth causes of action, kidnaping and prolonged arbitrary detention, in the total amount of $25,000.

It is FURTHER ORDERED that JUDGMENT be entered in favor of defendant Francisco Sosa and against plaintiff on all remaining causes of action asserted in the First Amended Complaint.

This JUDGMENT resolves all claims against all parties as asserted in the First Amended Complaint.

/s/ STEPHEN V. WILSON
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

DATED this 23 day of Sept., 1999.

APPENDIX G

STATUTORY APPENDIX

1. Section 878 of Title 21 provides, in relevant part:

(a) Any officer or employee of the Drug Enforcement Administration or any State or local law enforcement officer designated by the Attorney General may—

(1) carry firearms;

(2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpenas, and summonses issued under the authority of the United States;

(3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;

(4) make seizures of property pursuant to the provisions of this subchapter; and

(5) perform such other law enforcement duties as the Attorney General may designate * * *.

2. The Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, provides in relevant part:

§ 1346. United States as defendant.

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an

official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

* * * * *

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of

the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

* * * * *

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based

on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law

enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

FILED
OCT 31 2003

No. 03-485

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

vs.

HUMBERTO ALVAREZ-MACHAIN, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OTHER AUTHORITIES

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No. 03-485

Supreme Court of the United States

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Humberto Alvarez-Machain,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Humberto Alvarez-Machain submits this brief in opposition to the petition for a writ of certiorari filed by Petitioner United States of America. The United States seeks review of a well-reasoned ruling on a unique set of facts by the Court of Appeals sitting *en banc*, which correctly applied the applicable law upon which the circuit courts of appeal are not divided. Although the United States asserts that allowing the United States to be sued under the Federal Tort Claims Act ("FTCA") in these circumstances would seriously impair our Nation's ability to protect the national defense, this case simply does not present this Court with any pressing national security issues.

Rather, this case involves the decisions of relatively low-level Drug Enforcement Administration ("DEA") officials involved in bringing a criminal suspect to trial. Their decision to arrange for respondent to be kidnaped by private Mexican citizens hired by the DEA from his medical office in Mexico and brought to the United States for trial cannot be transformed *post hoc* into a decision with the kind of far-ranging consequences claimed in the petition. The possibility that the United States could be liable for tort damages for such conduct by low-level officials will not inhibit the war on terrorism or inhibit cooperation between the United States and foreign governments, where the President exercises his inherent and exclusive powers under Article II of the Constitution. The result below is a simple affirmation of the rule of law in circumstances where it was not respected.

The case presents no "compelling reason" for review under SUP. CT. R. 10. and is not a suitable vehicle for addressing the Government's broad concerns in the war on terrorism.

STATEMENT OF THE CASE

A. Introduction

Respondent opposes the petition for a writ of certiorari because the decision below is correct as a matter of law and warrants no further review. There is no split among the circuit courts on any of the issues presented in the petition. The United States does not seriously contend otherwise. Rather, the United States seeks review in this case by conjuring up

scenarios not raised by the facts in this case or the *en banc* decision below.

This case arises out of the transborder abduction of a criminal suspect from Mexico to the United States, authorized and orchestrated by DEA officials and carried out by private Mexican citizens who acted without legal authority. This case does not involve the authority of the President or cabinet officials to override international law to protect the national security of the United States. Nor does it address the authority of any U.S. agency other than the Drug Enforcement Administration to engage in extraterritorial arrests and other law enforcement activities or anti-terrorist activities. Thus, the Government's fears about the FBI or any other agency are simply not at issue in this case. Under the court of appeals' reasoning, Congress can provide DEA agents with extraterritorial arrest authority if it wishes and preclude similar claims in the future. In the absence of that legislative directive, a ruling from this Court allowing the *en banc* decision of the Ninth Circuit to stand will not compromise the ability of the United States government to defend the Nation.

What is at stake in this case is the rule of law. Basic principles dating back to the Magna Carta, enshrined in our Constitution and recognized in international human rights law, prohibit this kind of abuse of official authority. Though the factual setting is unique, it is unexceptional that the FTCA would be available to redress the abuse of governmental authority in these circumstances.

Petitioners' first question – whether federal law enforcement officials have the authority to arrest persons suspected of violating United States criminal statutes in

another country states the issue in this case with an implausible breadth and abstraction. The issue here is whether **DEA** officers had the authority to arrest a criminal suspect abroad using private agents in contravention of international and Mexican law based only on the notion that their law enforcement authority was co-extensive with the extraterritorial substantive reach of the criminal statute under which defendant was charged. There is no reason to believe that the officers involved in this operation believed they were authorized to arrest respondent in Mexico. Indeed, DEA agents in Mexico operated under strict restrictions on their authority. Presumably these low-level officials orchestrated a kidnaping by private Mexican citizens precisely because DEA agents lacked extraterritorial arrest authority. Moreover, the United States has identified no split in the circuit courts concerning the DEA's authority to engage in extraterritorial arrests.

Similarly, there is no conflict in the circuits regarding petitioner's second question – whether there is a "headquarters" exception to the "foreign activities" exclusion in 28 U.S.C. § 2680 (k). Every court of appeals to consider this question has determined that the United States may be found liable for the actions of federal officers whose decisions or actions within United States territory directly causes tort injuries outside the territory of the United States and that the intent of Congress in adopting the FTCA was to assure that government wrong-doing was compensable. This case would not be an appropriate vehicle to decide the contours of the "headquarters" doctrine because there has been no clarifying disagreement among the circuit courts on the existence, scope, or contours of the doctrine, let alone its clear applicability on facts like those in this case.

B. Proceedings Below

Respondent was abducted at gunpoint from his medical office in Guadalajara, Mexico, in April 1990. His kidnappers were private Mexican citizens paid by the DEA and acting without legal authority. He was transported to a nearby city, held overnight, and flown to El Paso, Texas, the next day where he was handed over to waiting DEA agents. All of these actions were orchestrated by the low-level federal officers named as defendants in this case. There is no hint in the extensive record of this case that the decision to kidnap respondent was approved by the President or any cabinet officer.

Respondent challenged the district court's jurisdiction and moved to dismiss his indictment, arguing *inter alia*, that his abduction was a violation of the U.S.-Mexican extradition treaty. Ultimately, this Court rejected respondent's treaty argument. *United States v. Alvarez-Machain* , 504 U.S. 655 (1992). Respondent went to trial in November 1992, and on December 14, 1992, the district judge granted a motion for a directed verdict of acquittal under FED. R. CRIM. P. 29, specifically finding that the Government's case was based on nothing more than "hunches."

Respondent filed this action on July 9, 1993, seeking damages for his April 1990 abduction, *inter alia*, under the FTCA for his false arrest and imprisonment. He filed administrative claims under the FTCA and added the United States as a defendant in an amended complaint filed in January 1994. The United States moved to substitute itself as a defendant under the Westfall Act for any claims respondent made against the federal officials named as defendants. This

motion was granted for all of the individual defendants except Francisco Sosa.

After years of discovery, the district court granted the United State's summary judgment motion with respect to respondent's FTCA claims. The district court granted a summary judgment against defendant Francisco Sosa with respect to respondent's claims under the Alien Tort Claims Act ("ATCA") and entered a judgment of $25,000 against him.

Both parties appealed to the United States Court of Appeals for the Ninth Circuit. A panel of the Ninth Circuit affirmed the district court's judgment against Sosa under the ATCA and reversed the district court's FTCA ruling against the United States and remanded to the district court for further proceedings on those claims. The Ninth Circuit agreed to rehear the appeal *en banc* and, on June 3, 2003, affirmed its decision on respondent's FTCA claims.

The *en banc* majority found that respondent's abduction constituted arbitrary arrest and detention, holding that Congress did not grant DEA agents broad authority to enforce warrants, issued in the jurisdiction of the United States, beyond its borders. 331 F. 3d 604, 623-24 (2003). It further held that plaintiff's claims did not fit within the FTCA's waiver provision or in any of the statutory exclusions. The majority followed established precedent in holding that the "foreign activities" exception, 28 U.S.C. § 2680 (k), did not apply to injuries that are proximately caused by acts in the United States. The court found that respondent's abduction fit this "headquarters doctrine" "like

a glove," *Id.* at 638, as it was conceived and directed by the DEA officials in the United States. *Id.*

REASONS FOR DENYING WRIT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS OR ANY OTHER COMPELLING REASON TO HEAR PETITIONER'S CONTENTION THAT THE COURT OF APPEALS ERRED IN FINDING THAT DRUG ENFORCEMENT ADMINISTRATION AGENTS LACKED THE STATUTORY AUTHORITY TO ARREST RESPONDENT IN MEXICO.

The United States' argument with respect to the DEA's arrest authority outside the borders of the United States reads as if it were part of a petition for certiorari in an entirely different proceeding. This case does not involve the arrest of a terrorism suspect abroad. It does not implicate the government's powers in such cases, or even in narcoterrorism cases. The actual issue in this case is whether Congress authorized the **Drug Enforcement Administration** to make extraterritorial arrests on facts like those in this case and intended for the FTCA to provide a remedy for such wrongs. Understandably, the United States chooses to downplay the issue of statutory authorization because it is aware that there is no *cert*-worthy conflict among the circuit courts on that issue and no pressing reason for this Court to review the question.

The presumption against extraterritorial application of the laws is well established. *Smith v. United States*, 507 U.S. 197, 204 (1993); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (hereinafter "*Aramco*"); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963); *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949). As noted by this Court in *In re Ross*, 140 U.S. 453, 464 (1891):

> When ... the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other.

Accord, Joseph Story, *Commentaries on the Conflict of Laws* § 20 (Boston, Little, Brown, and Co. 6th ed. 1865) at 22 ("no state or nation can, by its laws, directly affect, or bind property out of its own territory, or bind persons not resident therein . . . for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not resident within its own territory.")

The United States argues for the applicability of an exception to the rule against extraterritoriality, announced in *United States v. Bowman*, 260 U.S. 94, 98 (1922) (holding that federal criminal statute that does not specify extraterritorial application may nonetheless, in certain instances, prohibit overseas *conduct*). The United States' discussion of *Bowman* is disingenuous in that it devotes a page to *Bowman* without disclosing to this Court that *Bowman* (as well as the numerous lower court cases that cite *Bowman*) concerns whether a **substantive** criminal statute should be construed to have extraterritorial effect.

Neither this Court nor any court of appeals has found that the *Bowman* exception authorizes an extraterritorial *enforcement* power absent congressional authorization, and the distinction between the jurisdiction to legislate and the jurisdiction to enforce is basic in American law. *See, e.g.* American Law Institute, Restatement (Third) of Foreign Relations Law of the United States §§ 401 *et seq.* (1987) There is no conflict in the circuits on this issue, and this Court should deny the petition and permit the courts of appeals to continue to develop the law in this area.[1]

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[1] *Maul v. United States*, 274 U.S. 501, 510-11 (1927), construed a statute authorizing seizures by customs officers to apply to a Coast Guard seizure on the high seas. This Court cited *Bowman* and construed the statute to permit such seizures. However, this Court did not apply the *Bowman* exception to the presumption against extraterritorial application of statutes. Rather, the statute at issue permitted seizure by customs officials "as well without as within" their districts, *Maul*, 274 U.S. at 505, and this Court construed that language as authorizing seizures in international waters.

In *The Rosalie M.*, 4 F.2d 815, 816 (S.D. Tex. 1925), *aff'd on other grds.*, 12 F.2d 970 (5th Cir. 1926), the District Court did cite *Bowman* as justification for a seizure by a United States revenue cutter of a foreign-flagged boat in international waters. However, the court of appeals affirmed on a different ground, assuming the illegality of the seizure but holding that an illegal seizure did not deprive the courts of jurisdiction over the vessel. Every other lower court case that cites the *Bowman* extraterritoriality exception unambiguously concerns an issue of the substantive reach of a criminal statute.

Indeed, this Court's recent extraterritoriality cases, including the seminal *Aramco* case, do not even cite *Bowman*. As the Second Circuit has noted, this Court's caselaw has moved away from the *Bowman* analysis, rather than extending it in the unprecedented manner that the United States argues for. *See Kollias v. D&G Marine Maintenance*, 29 F.3d 67, 71 (2d Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995). Moreover, *Bowman* itself recognizes the narrow breadth of its holding. The presumption against extraterritoriality has full application even to most criminal statutes, with the *Bowman* exception applying only to crimes that are "not logically dependent on their locality for the Government's jurisdiction". 260 U.S. at 98.[2]

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[2]The *Bowman* rule has also been invoked on the issue of the substantive reach of a criminal statute (which *Bowman* governs) in cases where the enforcement power was also at issue, but the courts relied on other authorities, and not *Bowman*, to find that the government agency at issue had enforcement power. *See United States v. Yunis*, 924 F.2d 1086, 1092-94 (D.C. Cir. 1991) (Navy has statutory and regulatory authority to assist in arrest in international waters); *United States v. Walczak*, 783 F.2d 852, 856-57 (9th Cir. 1986) (upholding a search by United States Customs agents conducted at Vancouver International Airport in British Columbia pursuant to an international agreement between the United States and Canada); *United States v. Postal*, 589 F.2d 862, 872 n. 15 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979) (Coast Guard has *statutory* authority to board vessels); *United States v. Streifel*, 507 F. Supp. 480, 483-84 (S.D.N.Y.), *aff'd* 665 F.2d 414 (2d Cir. 1981) (same); *United States v. Cedena*, 585 F.2d 1252, 1257-58 (5th Cir. 1978), *overruled on other grds., United States v. Michelena-Orovio*, 719 F.2d 738, 757

Finally, it should be noted that the nonapplication of the *Bowman* exception to extraterritorial enforcement powers is entirely rational and sensible. As the United States itself notes, the main purpose of applying United States law outside the borders of this country is to govern conduct that has an adverse effect on the United States. *See Pet.* at 15 (citing *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286-88 (1952)). However, while the decision to apply this nation's laws to foreign activities that adversely affects the United States conceivably *could* offend a foreign government, in many cases it will not do so. In contrast, the decision to search, seize, and/or remove a foreign national in a foreign country would constitute a direct violation of the sovereignty of a foreign country.[3] If Congress wishes to allow such a

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(5th Cir. 1983), *cert. denied*, 465 U.S. 1104 (1984) (same); *United States v. Keller*, 451 F. Supp. 631, 637 (D.P.R. 1978) (same); *cf. United States v. Noriega*, 746 F. Supp. 1506, 1539-40 (S.D. Fla. 1990), *aff'd*, 117 F.3d 1206 (11thCir. 1997), *cert. denied*, 523 U.S. 1060 (1998) (citing *Bowman* on substantive reach of statute, but ruling legality of military invasion of Panama to capture defendant was unreviewable political question). If *Bowman* were applicable to enforcement powers, there would have been no need for these courts to look to other legal authorities for authorization of the challenged enforcement activities. These cases are inapplicable in this case given the absence of explicit statutory authorization for extraterritorial arrest, the absence of any international agreement on the abduction, and the vigorous formal protest of the government of Mexico.

[3]The Court of Appeals persuasively contrasted this case with *United States v. Chen*, 2 F.3d 330, 333-34 (9th Cir. 1993),

momentous decision to be made by low-level government officers, in violation of the domestic and international law, it must say so explicitly.[4]

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which permitted the INS to conduct *investigatory* activities outside the United States. Such investigatory activities do not give rise to the same diplomatic offense and foreign sovereignty violations as the conduct proven in the case at bar.

[4]The United States argues that it is somehow incongruous for drug laws to have extraterritorial effect but for the DEA to not have extraterritorial enforcement power. It is worth noting that Congress (whose intent the courts are supposed to be discerning in this case) could remedy any such "incongruity" with an express grant of statutory power and has not done so. Additionally, the United States' fundamental premise is wrong– there are many ways in which federal drug laws may be enforced other than through mid-level DEA agents hiring shady bounty hunters to kidnap suspects in foreign countries over the objections of the sovereign. These include extradition requests, joint law enforcement efforts with foreign countries, and the use of federal agencies that **do** have express extraterritorial powers, such as the Coast Guard. Further, this case does not present the issue of whether the President may authorize an extraordinary rendition under the Commander-in-Chief power. In sum, there is no principle of law that says that just because Congress has prohibited conduct in a particular area, that any and all law enforcement tactics are automatically permitted with respect to the enforcement of the prohibition.

The United States also argues that even if the *Aramco* presumption applies, the text of the DEA arrest statute (along with a similarly worded statute relating to the FBI) permit extraterritorial enforcement. This is demonstrably incorrect: the selectively quoted language of 21 U.S.C. § 878(a)(3), *Pet. Cert.* at 17, simply contrasts arrests for offenses made within an officer's presence – for which no probable cause is required – with offenses made outside the officer's presence – for which probable cause is required. The language is completely silent on the issue of whether such arrests may be made extraterritorially.[5]

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[5]Further, the United States' statutory construction argument proves too much. Section 878(a) permits *state and local officials authorized by the Attorney General*, and not just DEA officials, to exercise the powers set forth therein. If the United States' argument is correct, then Congress unknowingly authorized local sheriff's deputies and health department inspectors to make warrantless seizures in foreign countries. The United States' argument simply demonstrates why the *Aramco* presumption offers wise counsel on matters of statutory construction.

The United States points to the generic statement in the legislative history that the DEA authorization statute was intended to provide the Attorney General with the flexibility to utilize enforcement personnel wherever and whenever the need arises. *Pet.* at 19 (citation omitted). But this language is clearly devoid of any context that would indicate that the issue of extraterritorial enforcement was even considered. As for Sen. Specter's precatory encouragement to the government to apprehend terrorists abroad, *Pet.* at 19-20 (citation omitted), that statement concerns terrorism, not drug

The United States' other argument for certiorari on this question is that the Court of Appeals' decision below would somehow implicate the war on terrorism. This argument is fanciful. This case is not about the military, the Commander-in-Chief power, the wars in Iraq or Afghanistan, the detention of aliens at Guantanamo Bay, or the war on terrorism – all of which are raised in other pending cases. This case arose out of the unlawful abduction, by Mexican bounty hunters engaged by United States DEA officials, of a Mexican doctor to the United States in order to face detention and trial in the Central District of California on a charge (abetting the murder of a DEA agent) that a respected federal judge eventually dismissed on the ground that it rested on hunches and speculation. Nothing in the Court of Appeals' opinion in any way restricts: (1) the power of the President to order the extraterritorial seizure of foreign nationals, (2) the power of the US military to capture individuals in the battlefield or in occupied territories, or (3) the power of the United States government to detain suspected foreign terrorists overseas pursuant to the broad statutory powers to fight terrorism.

Indeed, there are cases currently in litigation or recently litigated that raise exactly those issues, including *inter alia*: *Hamdi v. Rumsfeld*, 316 F.2d 450 (4th Cir. 2003), *pet. for cert. filed* (Oct. 1, 2003); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (2002), *on reconsid. sub nom., Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (2003), *mot. to certify appeal granted*, 256 F. Supp. 2d 218

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law enforcement, and in any event, the views of a single legislator do not constitute cognizable legislative history. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980).

(S.D.N.Y. 2003); *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D.Va. 2002). If this Court believes that it needs to settle such issues, it should review a case that raises them directly, rather than this case, where the only connection to the war on terrorism is the innuendo and the unrelated parade of horribles that runs throughout the United States' petition.

Most importantly, the war on terrorism is fundamentally distinguishable, because in that instance, Congress has granted broad authority to the military to carry out the war on terrorism. *Hamdi*, 316 F.2d at 467 (citing Pub. L. No. 107-40, 115 Stat. 224 (Sep. 18, 2001) (resolution authorizing President and military to use all necessary force against those that the President determines to have planned, authorized, committed, or authorized the September 11 terrorist attacks)). Further, even if such authority to enforce United States laws against terrorism had not been granted by Congress to the appropriate Executive Branch agencies, the correct forum for litigating the existence and scope of any inherent national security power of the executive branch to fight terrorism would be in a terrorism case with a fully developed record and not in the context of this case.[6]

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[6]The Court of Appeals also noted that even in the area of international terrorism, Congress both grants specific authority to the executive branch to enforce criminal laws overseas, and puts limits on that power. *Alvarez-Machain v United States*, 331 F.3d 604, 630 n. 34 (9th Cir. 2003) (en banc) (citing 10 U.S.C. § 374(b)(1)(D) (permitting Secretary of Defense to authorize personnel to operate equipment used in the rendition of a terrorism suspect, but not authorizing arrests)).

It is also important to remember that this case is a suit for damages– and the amount of damages ultimately awarded, $25,000, was quite modest. This Court has already held that an illegal seizure does not vitiate the power to try a criminal defendant. *United States v. Alvarez Machain*, 504 U.S. 655, 661 (1992); *Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *Ker v. Illinois*, 119 U.S. 436, 444 (1886). The United States' argument seems to suggest that courts would award huge monetary recoveries to terrorists, so much so that the government might be deterred to take actions to save American lives. Such a scenario, even assuming all the questionable premises in the United States' argument, is not reasonable or plausible.[7]

No decision by this Court in this case will have any effect on the war on terrorism. The United States is simply using the war on terrorism as a subterfuge to ask this Court to involve itself in an unrelated dispute that does not present any conflict in the courts of appeals or any pressing question for review in this Court. If the government wants to expand the enforcement powers of the DEA, it should go to Congress and get the statutory authorization it seeks.

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[7]Indeed, the district court's judgment reflects the extraordinary difficulties of bringing a suit like this against the United States even in this context, where respondent is a Mexican doctor who was acquitted of all criminal charges and who was **not** a terrorist or accused terrorist.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS OVER THE AVAILABILITY OF A "HEADQUARTERS" EXCEPTION TO THE "FOREIGN COUNTRY" EXCEPTION OF THE FTCA, WHERE FEDERAL OFFICIALS DIRECT THE COMMISSION OF TORTS COMMITTED OUTSIDE THE BOUNDARIES OF THE UNITED STATES.

Petitioner argues that the "foreign country" exception of 28 U.S.C. 2680(k) bars recovery in this case. In so doing, petitioner argues for a wholly unprecedented and unsupported interpretation of FTCA and the "foreign country" exception.

In *Richards v. United States*, 369 U.S. 1 (1962), this Court focused the inquiry in FTCA claims to the location where acts or omissions *causing* the injury took place, rather than the location where the injury itself occurred. The courts of appeal have unanimously interpreted this principle to give rise to a "headquarters" claim, where decisions made within the United States cause harm in a foreign country. *See also Sami v. United States*, 617 F.2d 755, 761 (D.C. Cir. 1979)("the entire scheme of the FTCA focuses on the place where the negligent or wrongful act or omission of the government employee occurred"). In interpreting 28 U.S.C. 2680(k)'s exception for claims "arising in a foreign country," courts have applied this FTCA focus, to find that injuries occurring in foreign countries, caused by wrongful acts or omissions in the United States, "arise" in the United States. *See Couzado v. United States*, 105 F.3d 1389 (11th Cir. 1997); *Bowles v. United States*, 950 F.2d 154 (4th Cir. 1991); *Glickman v. United States*, 626 F. Supp. 171 (S.D.N.Y.

1985); *In re Agent Orange Product Liability Litigation*, 580 F. Supp. 1242 (E.D.N.Y. 1984).

The validity of the headquarters doctrine has not been questioned by the lower courts, and even those cases that have declined to apply this doctrine have done so on the basis of insufficient evidence or the failure to establish proximate causality, not on the validity of the doctrine itself. *See De Martinez v. Lamagno*, 23 F.3d 402 (4th Cir. 1994)(finding that the plaintiffs had failed to establish the plausible proximate nexus between acts or omissions in the United States and the resulting damage in a foreign country necessary to establish a headquarters claim), judgment rev'd on other grounds, 515 U.S. 417 (1995); *Cominotto v. United States*, 802 F.2d 1127 (9th Cir. 1986)(similar); *Knudsen v. United States*, 500 F. Supp. 90 (S.D. N.Y 1980)(finding that there was no issue of fact as to proximate causation because the plaintiff had failed to provide evidence to counter the governments assertions that all relevant activities had occurred abroad).

As the *en banc* decision noted, the facts of Respondent's abduction fit the headquarters doctrine "like a glove." *Alvarez-Machain v. United States*, 331 F.3d 604, 638 (9th Cir. 2003). DEA agents made the decision to falsely arrest and imprison Dr. Alvarez, gave precise instructions on recruiting and the operation itself, and supervised Alvarez's transportation to the United States. The United States served as "command central." *Id.* at 639.

Because it cannot, petitioner does not challenge the strength of the headquarters doctrine on its face, but rather, argues against it on policy grounds – arguing that it would be an impermissible judicial intervention in the affairs of the

executive branch. Petitioner justifies this radical departure from accepted FTCA jurisprudence by presenting a novel purpose for the "foreign countries" exception – that of preventing judicial intervention into matters of foreign relations. Pet. Cert., at 28. Petitioner provides no source from which this purpose was derived. In fact, this Court's own findings about the purpose of the "foreign country" exception directly contradict petitioner's claim.

In *United States v. Spelar*, this Court found that the 28 U.S.C. 2680(k) exception resulted from Congress' "unwilling[ness] to subject the United States to liabilities depending upon the laws of a foreign power," 338 U.S. 217, 221 (1949), and not from any concern over judicial intervention in foreign affairs. Moreover, the Court found that Congress *was* "ready to lay aside" much of the executive's sovereign immunity, thus subjecting the executive branch to judicial review of its potentially tortious actions. *Id.*

Finally, in arguing that the application of the headquarters doctrine would be an impermissible judicial intervention in foreign relations, petitioner mischaracterizes the type of judicial intervention that the FTCA permits in this case. In granting Dr. Alvarez relief for his injuries, the Court would not be changing any policy decision made by the executive branch. It would merely be requiring that Dr. Alvarez be compensated for injuries resulting from the DEA's tortious activities.

This is one crucial way in which this case is distinguished from the cases petitioner cites to support its strict interpretation of judicial intervention. Each of the cases

petitioner cites involves instances in which the judicial review could require the executive to change a policy or reverse a decision. *See Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) (involving a request for review of a decision by the Civil Aeronautics Board to deny a request for a certificate); *Department of the Navy v. Egan*, 484 U.S. 518 (1987) (involving a review of a decision to respondent Egan from Navy because of national security concerns); *Haig v. Agee*, 453 U.S. 280 (1981)(involving a request to block revocation of passport).

In granting Dr. Alvarez relief, the district court will not intervene in the activities of the Executive Branch. The district court will not review or require a change in any policy or decision of the executive. Rather, the Court will be doing exactly what the FTCA permits, compensating a person injured by the tortious activities of the federal officials. This is a traditional judicial function authorized by Congress.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

October 31, 2003

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No. 03-485

In the
Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Respondent does not dispute the nature of the Ninth Circuit's holdings in this case, only their importance. Invoking the presumption against extraterritorial application of United States law in order to limit Executive Branch authority, the Ninth Circuit held that DEA agents—although charged with enforcing laws that expressly apply to conduct outside the United States—lack statutory enforcement authority beyond the Nation's borders, even when acting with a foreign nation's consent. In the same opinion, however, the Ninth Circuit ignored that presumption so as to expand judicial authority. Refusing to give effect to a textual prohibition against adjudication of "any claim arising in a foreign country" under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2680(k), the Ninth Circuit held that federal courts can review officer conduct alleged to be tortious *solely because* it took place abroad. Both holdings portend serious and ongoing interference with the Executive's ability to enforce the law and conduct foreign affairs.

Respondent does not seriously defend the Ninth Circuit's highly selective application of the presumption against extraterritoriality. See Pet. 29-30. Nor does respondent attempt to reconcile it with the Constitution's allocation of authority among the Branches. The Constitution assigns primary responsibility

for law enforcement and foreign affairs to the Executive Branch, not the judiciary. Yet the Ninth Circuit indulged the opposite presumption, reading grants of authority to the Executive parsimoniously to circumscribe that Branch's enforcement authority, while reading a limited grant of judicial authority broadly to encompass the power to review Executive action abroad.

More important, the Ninth Circuit's decision threatens the government's ability to conduct international law enforcement operations necessary to combat the flow of illegal drugs into the United States and ensure the safety of the Nation's citizens. Under the holding below, criminals hiding in countries unwilling or unable to apprehend them (including countries that will allow United States authorities to arrest the criminals) have a safe harbor from federal law enforcement. Notwithstanding respondent's unsupported protestations to the contrary, the decision casts a dangerous pall of uncertainty not merely over the DEA's authority but over that of the FBI and other agencies actively involved in law enforcement actions abroad, precisely when those efforts are most critical to the Nation's security.

A. The Decision Below Misapplies The Presumption Against Extraterritoriality And Invades Executive Authority

1. Respondent begins by defending the Ninth Circuit's decision as a "well-reasoned" judgment that "correctly" invokes the presumption against extraterritorial application of United States law. Br. in Opp. 1, 8. As respondent concedes, however, this case does not concern whether the relevant *substantive* criminal laws apply extraterritorially. It is undisputed that they do. Pet. 16; Pet. App. 36a (finding "no doubt that the substantive criminal statutes under which [respondent] was charged apply to acts occurring outside the United States"). The question is whether the statutory authority of federal agents under 21 U.S.C. 878 should be read to proscribe federal *enforcement* of those laws abroad. By its terms, Section 878(a)(3)(B) empowers DEA agents to make warrantless arrests on probable cause "for *any felony, cognizable under* the laws of the United States," without limiting where enforcement can occur. It thus is most

naturally read as granting the Executive Branch enforcement authority that extends at least as far as the laws it is charged with enforcing and wherever enforcement is deemed to be necessary and prudent. By contrast, respondent implausibly assumes that Congress, even as it enacted laws making conduct that occurs wholly outside the United States a felony, chose sweepingly to deny the agencies charged with enforcing those laws authority to act abroad, with or without foreign nation consent. Pet. App. 35a n.24 (rejecting the notion that DEA authority "rests on 'the consent or assistance of the host country'").

Defending that result, respondent declares that principles of national sovereignty and the need to avoid conflicts with foreign powers require Section 878 to be read as barring such enforcement activities. Br. in Opp. 1, 8-9. But that proves too much. Pet. 21 It violates neither international law nor the sovereignty of a foreign county for federal agents to arrest a suspect abroad *with* that foreign nation's public or confidential consent. *Ibid.* The Ninth Circuit nonetheless construed Section 878 to foreclose even those arrests, without explaining why Congress would have wanted to preclude such cooperation.[1] The Ninth Circuit's decision, moreover, is more likely to promote international conflict than avoid it. As respondent concedes, Br. in Opp. 12 n.4, 14-15, the United States' *armed forces* may be used to seize

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[1] Respondent's assertion that a "decision to search, seize, and/or remove a foreign national in a foreign country would constitute a direct violation of the sovereignty of a foreign country," Br. in Opp. 11, is thus inaccurate. Foreign nations can authorize actions that would otherwise violate their sovereignty. Respondent offers no reason why Congress would have wanted to foreclose foreign nations from pursuing that course. Respondent's reliance (Br. in Opp. 8) on dictum from *In re Ross*, 140 U.S. 453, 464 (1891), is similarly misplaced. In that case, this Court recognized that federal officers not only could arrest outside the United States but that they also could conduct trials there. That case, moreover, concerned the arrest of a United States seaman for committing murder on board a military vessel docked in Japan, and the authority to make the arrest was unquestioned. Respondent's similar reliance (Br. in Opp. 8) on Justice Story's observation that "no state or nation can, by its laws, * * * bind persons not resident therein," is also misplaced. Congress has enacted numerous statutes proscribing conduct abroad, the validity of which is not disputed.

criminals hiding abroad. See Pet. App. 3a; *id.* at 81a n.1 (O'Scannlain, J., dissenting); *id.* at 117a (Gould, J., dissenting). The suggestion that Congress sought to avoid international conflict by promoting military incursions over law enforcement actions strains credulity. See Pet. 22.

2. The Constitution charges the Executive Branch with the duty to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, and makes "foreign policy" that Branch's "province and responsibility," *Department of the Navy* v. *Egan*, 484 U.S. 518, 529-530 (1988); Pet. 21. It is unnatural to read Section 878 as limiting the Executive's exercise of those responsibilities. Instead, Section 878's authority to arrest for *any* felony is best read to grant broad arrest authority to federal officers, while leaving case-specific decisions regarding where and when to enforce the law, and determinations of when, whether, and how to obtain (or what constitutes) a foreign Nation's consent, to the Executive Branch. Pet. 20-21; Pet. App. 101a, 107a-108a (O'Scannlain, J., dissenting). The Executive must have the ability to respond to "[s]ituations threatening to important American interests [that] may arise half-way around the globe." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 275 (1990). Neither respondent nor the Ninth Circuit have offered a compelling reason to read Section 878 as limiting rather than promoting that ability. The legislative record makes it clear that Congress both was aware of crime's international dimension, and that it sought to provide the Executive with correspondingly broad enforcement authority through "flexibility in the utilization of enforcement personnel *wherever and whenever the need arises*." H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1, at 54 (1970) (emphasis added); see Pet. 19.[2]

As this Court explained in *United States* v. *Bowman*, 260 U.S. 94, 98 (1922), the presumption against extraterritoriality has no application to "criminal statutes which are, as a class, not logi-

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[2] Respondent's effort to distinguish that language (see Br. in Opp. 13 n.5) as "generic" is unconvincing given Congress's specific acknowledgment that crime, and drug crimes in particular, are international in scope.

cally dependent on their locality." Where, as here, Congress enacts criminal laws that expressly apply abroad and charges Executive Branch agencies with enforcement, that authority is not logically limited by location. If a violation is no less a felony when committed abroad, the DEA's authority to make arrests for that violation should not be confined. Nor does the government's interest in enforcement terminate once a suspect who, having committed crimes here, flees abroad. See Pet. 18-19.

Respondent nonetheless argues (Br. in Opp. 8-9 & n.1) that the *Bowman* principle is limited to substantive criminal prohibitions and cannot be applied to statutes authorizing enforcement. But that contention is flawed at several levels. First, because the DEA's arrest authority is defined by reference to substantive criminal law (*i.e.*, "any felony"), it is artificial to draw respondent's distinction between substantive law and enforcement authority. Congress tied the two together. Second, the very cases cited by respondent refute his contention. In *Maul* v. *United States*, 274 U.S. 501, 510-511 (1927), this Court invoked *Bowman* to construe an ambiguous statute to authorize extraterritorial enforcement. In that case, revenue cutters—customs enforcement vessels—had been assigned to particular "districts" in United States waters, 274 U.S. at 509-510, and Congress had reflected that practice by authorizing Revenue Cutter Officers to make certain seizures "as well without as within their respective districts," *id.* at 510. The Court agreed that the statutory language might be read as authorizing seizures only "within other customs districts" and thus to exclude extraterritorial seizures in "the sea outside customs districts." *Id.* at 510-511. But the Court rejected that construction. If vessels "violating the revenue laws * * * could escape seizure by departing from or avoiding waters within customs districts, the liability * * * would be of little practical effect in checking violations, and it is most improbable that Congress intended to leave the avenues of escape thus unguarded." *Id.* at 511. Citing *Bowman* (and not the rule against extraterritoriality), the Court thus upheld extraterritorial seizure authority. *Ibid.* Justice Brandeis (joined

by Justice Holmes) similarly observed: "If the officers of revenue cutters were without authority to seize American merchant vessels found violating our laws on the high seas beyond the twelve-mile limit, or to seize such vessels found there which are known theretofore to have violated our laws without or within those limits," then "many offenses against our laws might, to that extent, be committed with impunity." 274 U.S. at 520 (Brandeis, J. concurring).[3]

The same reasoning applies here. If criminals who violate federal law in this country, and criminals who violate federal law applicable to conduct abroad, could "escape seizure by departing from or avoiding" the territory of the United States, those criminal laws "would be of little practical effect * * *, and it is most improbable that Congress intended to leave the avenues of escape thus unguarded." 274 U.S. at 511. Certainly such limits on enforcement authority are not "lightly to be assumed," *id.* at 525 (Brandeis, J., concurring), particularly in view of the Executive Branch's constitutional obligation to "take Care that the Laws be faithfully executed," and its primacy in matters of international relations. By reading limits on that Branch's constitutional authority into a federal statute that does not itself impose them, the Ninth Circuit exceeded the judicial function.

B. The Ninth Circuit's Decision Hinders Critical International Law Enforcement Activities

Disputing the significance of the Ninth Circuit's en banc decision, respondent argues that it does not affect "the authority of any U.S. agency other than the [DEA]." Br. in Opp. 3; see *id.* at 2, 4, 7. That effort at minimization ignores the DEA's important international efforts to combat the flow of drugs into the United States and international drug cartels. It was, after all, an effort to determine the scope of the DEA's knowledge that led the members of one such cartel to kidnap, torture, and murder DEA

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[3] Noting that the arrest power of peace officers was not "conferred originally by statute" but was "thought to inhere in these officers, except in so far as they may be limited by statute," Justices Brandeis and Holmes found extraterritorial seizure authority unquestionable. 274 U.S. at 524 & n.27.

agent Enrique Camarena-Salazar in Mexico. Those actions triggered respondent's arrest and prosecution, and ultimately this lawsuit. The impact on the DEA's authority is itself sufficient to justify this Court's review.

Respondent, in any event, nowhere distinguishes the FBI's arrest authority, or that of any other law enforcement agency. Pet. 17, 23-24. Respondent thus does not dispute that the Ninth Circuit rejected the very analysis adopted by the Justice Department's Office of Legal Counsel to uphold the extraterritorial law enforcement authority of the FBI. Pet. 24. Thus, precisely at the moment when the international law enforcement activities of the FBI and other agencies are most critical, the Ninth Circuit's decision casts doubt on their legality.[4]

Respondent's repeated assertion (Br. in Opp. 1, 2, 3, 7, 15, 16) that the decision will have little effect on international law enforcement initiatives, including efforts to preserve national security and combat terrorism, is largely premised on the option of military force. But law enforcement agents, in addition to the armed forces, are critical international law enforcement tools that should be available to the President. See, *e.g.*, Pet. 24 & n.9 (noting seizure of Mir Aimal Kasi in Pakistan by FBI agents). The Executive Branch should not be left with an all or nothing choice, but should have non-military options that are more likely to be acceptable to and accepted by foreign countries. See Pet.

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[4] Respondent likewise errs in repeatedly attempting to dismiss this case as involving decisions by "low-level" officials. Br. in Opp. 2, 3, 4, 5, 12. A decision of the DEA Deputy Administrator (a presidential appointee and the number two person in that agency) cannot be dismissed as "low-level." Respondent, furthermore, nowhere asserts that the result would be different if higher level authorization had been granted. The Ninth Circuit majority expressly held that the DEA lacks statutory authority for arrest outside the United States, without regard to such authorization, and the statutes at issue here confer no greater arrest authority on DEA agents when the arrest is approved by the Attorney General than when it is approved by the DEA's Deputy Administrator. See Pet. 23 n.8. The contrary view, moreover, would require federal courts to engage in the dubious enterprise of investigating executive decision-making in the sensitive area of foreign affairs and enforcing judicially developed distinctions among various federal officers.

22, 25-26.[5] In delicate matters of international affairs, and especially in the current environment, the Executive must have available and be able to choose an approach that best balances foreign policy and law enforcement objectives.[6]

C. The Ninth Circuit's Decision Defies An Express Limit On Jurisdiction

Finally, respondent nowhere disputes that the Ninth Circuit, even as it narrowly construed the Executive Branch's authority to enforce the law outside this country, broadly construed its own authority to review such extraterritorial conduct under the FTCA. Nor does respondent dispute that the Ninth Circuit did so despite the FTCA's exclusion of "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k)—a limit on a waiver of sovereign immunity that must be construed strictly in favor of the United States. See Pet. 26.

Instead, respondent argues that the Ninth Circuit's decision is correct under the judicially developed "headquarters doctrine," which allows federal courts to offer redress for *conduct* that

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[5] Respondent also asserts that the Executive Branch may employ "extradition requests" or "joint law enforcement efforts" with foreign countries. Br. in Opp. 12 n.4. But that merely illustrates the extraordinary effect of the Ninth Circuit's decision. As this Court has observed, "[s]ome who violate our laws may live outside our borders under a regime quite different from that which obtains in this country"—including countries that may have no effective government at all, or regimes sympathetic to United States interests but unwilling to engage in enforcement efforts themselves. *Verdugo-Urquidez*, 494 U.S. at 275. Under the Ninth Circuit's view, criminals hiding in those countries have a safe harbor from all but the use of military force. Although respondent proposes that the Coast Guard effect the seizures, respondent does not assert that the Coast Guard has the necessary expertise, and cites no statute expressly authorizing the Coast Guard to operate on dry land inside the territory of foreign nations, as respondent would require. Respondent's proposal, moreover, would make an arrest's legality turn on the agency to which it is charged, and would embroil the federal courts in difficult distinctions among military, national security, and law enforcement activities. See Pet. 22 n.6.

[6] Respondent's related assertion (Br. in Opp. 14-15) that "there are cases currently in litigation" that more directly "raise" these issues is incorrect. None of the cited cases concern the ability of law enforcement agencies to seize criminals abroad.

takes place in the United States even if the resulting "injuries occur[] in foreign countries." Br. in Opp. 17-18. But that doctrine has never been adopted by this Court and, at least as applied here, robs the express foreign country exception of all force.[7] In this case, the allegedly tortious *conduct*, respondent's arrest, took place in Mexico. The only reason that arrest—the seizure of an indicted suspect on probable cause—was deemed "false" and thus actionable was that it took place abroad and not in the United States. And, for the same reason, liability began with respondent's seizure in Mexico and ended once he moved across the border into the United States. See Pet. 26, 27-28. Respondent cites no case for the extraordinary proposition that the FTCA exception for claims "arising in a foreign country" is inapplicable where the allegedly tortious conduct occurs abroad, where damages accrue only while that conduct continues abroad, and where the only reason the conduct is tortious is that it occurred abroad. The decision effectively reads the foreign country exclusion out of the statute.

Further, as this Court explained in *United States* v. *Spelar*, 338 U.S. 217, 221 (1949), one reason Congress enacted the foreign country exception was to prevent the United States from being subject "to liabilities depending upon the laws of a foreign power." The Ninth Circuit's decision thus transgresses both the literal limits of the foreign country exception and its purpose, since liability is premised on the arrest's inconsistency with *Mexican* law and sovereignty. Respondent, in addition, does not dispute that the Ninth Circuit improperly denied federal officers authority to make citizen arrests on probable cause when acting without official authority, even though ordinary citizens (who similarly act without official authority) can make citizen arrests. Pet. 28 n.12. And the court of appeals' expansive construction of its own authority under the FTCA (and under the Alien Tort

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[7] Although respondent cites *Richards* v. *United States*, 369 U.S. 1 (1962), *Richards* did not concern the foreign country exclusion. The question in *Richards* was which State's laws (including choice of law rules) should apply to a plane crash in Missouri where the negligence occurred elsewhere.

Statute at issue in *Sosa* v. *Alvarez-Machain*, No. 03-339), placed that court squarely where federal courts do not belong—in the realm of international politics, adjudicating the propriety of Executive conduct abroad.[5]

Finally, respondent suggests that this case merely involves "monetary recoveries" or "damages" that will not affect law enforcement activities. Br. in Opp. 2, 16; see *id.* at 19, 20 (decision does not alter "any policy decision" but "merely requir[es] that [respondent] be compensated"). Although this case arises from a request for damages, the en banc decision expressly holds that DEA agents act illegally if they engage in law enforcement activities beyond this Nation's borders. That principle cannot easily be cabined to damages actions. Law enforcement officials charged with faithful execution of the Nation's laws ought not be required to choose between exercising their authority to protect this Nation's citizens from criminals abroad and fidelity to a federal appellate court's en banc decision. This Court's cases, in any event, recognize that the threat of damages actions will deter individual officers, see *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 71 (2001), and the United States should not be tethered to a pay-as-you-go system for the conduct of law enforcement and foreign policy, especially when both arrest authority and the FTCA's inapplicability are clear.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted and the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

NOVEMBER 2003

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[5] Because the petition in this case and in No. 03-339 raise one question in common, together with several exceedingly important and complex questions concerning distinct statutory regimes, the Court should consider granting both petitions and setting the cases for consecutive arguments on the same day.

(6)

No. 03-485

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether federal law enforcement officers, and agents of the Drug Enforcement Administration in particular, have authority to enforce a federal criminal statute that applies to acts perpetrated against a United States official in a foreign country by arresting an indicted criminal suspect on probable cause in a foreign country.

2. Whether an individual arrested in a foreign country may bring an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, for false arrest, notwithstanding the FTCA's exclusion of "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k), because the arrest was planned in the United States.

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28 U.S.C. 2680(k) ..... *passim*
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DEA History Book (last visited Jan. 20, 2004) <http://www.usdoj.gov/dea/pubs/history/deahistory_01.htm#> 22, 23
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Byte Out of History: Solving a Complex Case of International Terrorism (last modified Dec. 19, 2003) <http://www.fbi.gov/page2/dec03/panam121903.htm.> .....
Partnering Against Global Threats: FBI Director Discusses Common Issues in Mideast and Europe (last modified Nov. 10, 2003) <http://www.fbi.gov/page2/nov03/rsm111003.htm> 33
H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1 (1970) 21
H.R. Rep. No. 1144, 94th Cong., 2d Sess. (1976) 27
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http//www.usdoj.gov/dea/agency/domestic.htm (last visited Jan. 23, 2004) 33
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In the Supreme Court of the United States

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HUMBERTO ALVAREZ-MACHAIN, ET AL.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-121a) is reported at 331 F.3d 604. The panel opinion of the court of appeals (Pet. App. 122a-156a) is reported at 266 F.3d 1045. The district court's orders of March 18, 1999 (Pet. App. 157a-207a) and May 18, 1999 (Pet. App. 208a-211a), and its September 9, 1999, judgment (Pet. App. 212a-247a), as amended on September 23, 1999 (Pet. App. 248a-249a) are unreported.

JURISDICTION

The judgment of the court of appeals sitting en banc was entered on June 3, 2003. By order dated August 27, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including October 1, 2003, and the petition was filed on that date. A petition for a writ of certiorari was granted on December 1, 2003. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of Section 878 of Title 21, and the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, are set out in the Appendix to this brief, App., *infra*, 1a-7a.

STATEMENT

1. In February of 1985, DEA Special Agent Enrique Camarena-Salazar was abducted by members of a Mexican drug cartel and brought to a house in Guadalajara, Mexico, where he was tortured for two days to extract information regarding what the DEA knew about the cartel. Camarena-Salazar was then murdered and buried in a park near Guadalajara. See *United States* v. *Zuno-Arce*, 44 F.3d 1420, 1422 (9th Cir.), cert denied, 516 U.S. 945 (1995); *United States* v. *Vasquez-Velasco*, 15 F.3d 833, 843 (9th Cir. 1994). Eyewitnesses placed respondent Humberto Alvarez-Machain, a Mexican citizen, at the house while Camarena-Salazar was being tortured. See *United States* v. *Zuno-Arce*, 25 F. Supp. 2d 1087, 1093 (C.D. Cal. 1998), aff'd, 209 F.3d 1095 (9th Cir. 2000); see Pet. App. 213a. DEA officials believe that respondent, "a medical doctor, participated in the murder by prolonging Agent Camarena's life so that others could further torture and interrogate him." *United States* v. *Alvarez-Machain*, 504 U.S. 655, 657 (1992).

In 1990, a federal grand jury indicted respondent for the torture and murder of Camarena-Salazar in violation of, among other statutes, 18 U.S.C. 1201(a)(5), (c), and the United States District Court for the Central District of California issued a warrant for his arrest. Pet. App. 213a. The DEA attempted to obtain respondent's presence in the United States through informal negotiations with Mexican officials. *Alvarez-Machain*, 504 U.S. at 657 n.2. After those negotiations proved unsuccessful, the DEA approved the use of Mexican nationals to take custody of respondent in Mexico and to transport him to the United States. Several Mexican nationals, acting at the behest of the DEA, then seized respondent from his office in Mexico; within a period of less than 24 hours, they moved him to the United States and into the custody of United States law enforcement officials. Pet. App. 5a.

Respondent moved for dismissal of the indictment against him, arguing that he could not be tried in the United States because his seizure from Mexico was contrary to international law and an extradition treaty between the United States and Mexico. The district court and the Ninth Circuit agreed, ordering that the charges be dismissed and that respondent be returned to Mexico. See *United States* v. *Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991) (per curiam), affirming *United States* v. *Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990). This Court reversed. Respondent's arrest, the Court held, "was not in violation of the Extradition Treaty." *Alvarez-Machain*, 504 U.S. at 670. The Court further held that, even if the arrest violated international law, respondent could be tried nonetheless. *Id.* at 669-670. The case was remanded for trial. However, at the close of the government's case, the district court granted respondent's motion for a judgment of acquittal. Pet. App. 6a.

2. In 1993, after returning to Mexico, respondent brought this civil action asserting various claims—including false arrest and imprisonment—against the United States, several DEA officials, and seven named and unnamed Mexican nationals. Although respondent also brought tort claims asserting abuse and torture, the district court rejected those after trial, finding such accusations "unworthy of belief," "incredible," and "completely contrived," and that respondent had repeatedly "lied during his deposition." Pet. App. 277a-228a, 230a, 231a; see also *id.* at 224a-225a (earlier findings, in criminal case, that respondent's torture claims were "not worthy of belief" and "simply * * * not credible"). Respondent did not appeal those findings, and those claims are therefore no longer at issue in this case. Pet. App. 7a-8a & nn.2-3.

Respondent sought recovery from the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, which provides that the "United States shall be liable * * * to tort claims, in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674, subject to certain limits and

exceptions, including an exception for "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k). Respondent also sought recovery from various individual defendants under 28 U.S.C. 1350. The district court substituted the United States for the individual federal defendants pursuant to 28 U.S.C. 2679. The United States, however, was not substituted for José Francisco Sosa, a Mexican national, for respondent's claims under 28 U.S.C. 1350. Pet. App. 159a & n.2.

a. Following an interlocutory appeal, see *Alvarez-Machain* v. *United States*, 107 F.3d 696 (9th Cir. 1996), cert. denied, 522 U.S. 814 (1997), the district court granted the United States' motion for summary judgment. Although the government argued that the action for false arrest and false imprisonment under the FTCA was barred by the foreign country exception in 28 U.S.C. 2680(k), the district court rejected that argument. Pet. App. 177a-181a. The court agreed that the arrest took place in Mexico. *Id.* at 177a. But the court held that respondent had stated a "valid 'headquarters claim' for his seizure because it stemmed from a plan which developed entirely within the United States." Pet. App. 179a; see *id.* at 178a-181a & n.16.

The district court nonetheless concluded that respondent had failed to establish a false arrest claim under California law.[1] California defines false arrest as "an arrest conducted without lawful authority." Pet. App. 184a. Looking to state court decisions and statutes, *id.* at 184a-185a, the district court determined that California law authorizes both peace officers and private citizens to make an arrest whenever

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[1] Under the FTCA, the government's liability is determined according to local law. See 28 U.S.C. 1346(b) (giving courts jurisdiction over certain tort claims "if a private person" would "be liable to the claimant in accordance with the law of the place where the act or omission occurred"). The government has argued that, because the arrest occurred in Mexico, Mexican law should govern—and that, for that reason, the foreign country exception of the FTCA must apply. However, the parties agreed that if, contrary to the position of the United States, Mexican law did not apply, California law would. The district court thus applied California law.

they have "reasonable cause" to believe the person to be arrested has committed a felony. *Id.* at 184a (citing Cal. Penal Code §§ 834, 837). The court concluded that those provisions would "clearly" authorize government agents and private citizens alike to arrest respondent, an indicted criminal suspect. *Id.* at 185a. California law, the court also held, treats police officers acting outside their jurisdiction as private citizens and permits them to conduct citizen's arrests. *Id.* at 184a-185a.

Because the arrest in this case took place in Mexico, the district court also addressed how California law would treat extraterritorial arrests. Pet. App. 185a-190a. The court noted that California law allows a foreign peace officer in fresh pursuit to exercise arrest authority in California. *Id.* at 186a-187a. Similarly, the court explained that California law allows individuals who are not California citizens to conduct citizen's arrests. Thus, "if a peace officer, or any individual, from another state entered California with the requisite probable cause to arrest an individual, then California would presumably not consider that action a false arrest"; instead, it would be treated as a citizen's arrest. *Id.* at 187a. Because the government had probable cause to arrest, the district court concluded that the arrest was not false within the meaning of California law. *Id.* at 189a.

The district court, however, granted summary judgment against one of the Mexican nationals, José Francisco Sosa, holding him liable under 28 U.S.C. 1350. In particular, the court concluded that respondent's transborder arrest and detention violated international law. Pet. App. 194a-199a, 209a-210a. Nonetheless, the court held that respondent was entitled to damages only from the time he was seized in Mexico until he was handed over to law enforcement officials in the United States. Once respondent was handed over to United States officials, the court held, the United States law enforcement authorities made an independent and lawful decision to keep respondent in custody for which Sosa could not be held liable. *Id.* at 233a-241a. After trial (and after

rejecting respondent's claims of mistreatment, see p. 3, *supra*), the court entered judgment for respondent and against Sosa in the amount of $25,000. Pet. App. 244a, 247a.

3. Respondent and Sosa appealed. On September 11, 2001, a panel of the Ninth Circuit affirmed in part and reversed in part. Pet. App. 122a-156a.

With respect to the FTCA false arrest claim, the panel reversed the judgment in favor of the United States. The panel stated that, "to determine whether a federal officer had lawful authority to carry out an arrest, a California court would first ask whether the arrest was authorized under federal law." Pet. App. 142a. The panel agreed that the criminal statutes under which respondent was indicted expressly apply to acts occurring abroad. See *id.* at 143a. And it agreed that the arrest authority provided to DEA agents under 21 U.S.C. 878—authority to "make arrests without warrant * * * for any felony, cognizable under the laws of the United States," on probable cause—is very broad. Pet. App. 143a.

The panel, however, refused to hold that DEA agents have statutory authority to enforce extraterritorial laws abroad, remarking that "[i]f this assertion is an accurate statement of United States law, then it reinforces the critics of American imperialism in the international community." Pet. App. 144a. The panel instead "suppose[d] that Congress intended for federal law enforcement officers to obtain lawful authority, which, for example, here might be a Mexican warrant, from the state in which they sought to arrest someone." *Ibid.* Because the DEA did not obtain an arrest warrant from a Mexican court, the panel concluded that respondent's arrest was effected "without lawful authority" and was actionable against the United States as a "false arrest" under the FTCA. *Id.* at 145a.

The panel rejected the district court's conclusion that the arrest was not "false" as a matter of California law. Pet. App. 145a-147a. The court did not dispute that, under California law, an arrest effected outside the scope of an officer's

statutory or jurisdictional authority may be deemed a lawful citizen's arrest. *Id.* at 145a. But the court held that the proper standard for federal law enforcement officers is the law governing arrests pursuant to a warrant. In this case, the court stated, the warrant issued for respondent's arrest "had no effect in Mexico," and its "invalidity * * * for the purposes of [respondent]'s arrest meant that the DEA agents did not act properly under the general common law." *Id.* at 146a; see also *id.* at 147a (arrest improper because court issuing the warrant "had no jurisdiction to issue a warrant for an arrest in Mexico").

The panel also rejected the government's argument that the claim was precluded by the FTCA's exception for "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k). See Pet. App. 135a-139a. Because the seizure had been planned and directed in the United States, the court stated, the claim was actionable under the so-called "headquarters" exception. See *id.* at 137a-139a.

Finally, the panel affirmed the judgment in favor of respondent against Sosa under 28 U.S.C. 1350. Pet. App. 125a-133a. The panel first held that the seizure violated "the law of nations" because it infringed respondent's right to "freedom of movement, to remain in his country, and to security in his person." *Id.* at 131a. In the alternative, the court held that the arrest violated the international law prohibition on "arbitrary detention." *Id.* at 131a-133a. A detention is "arbitrary," the court of appeals held, if it is not "pursuant to law." *Id.* at 132a. Because the court concluded that respondent's seizure "occurred pursuant neither to the laws of Mexico nor to the laws of the United States," the court held that it was an "arbitrary" arrest. *Id.* at 130a, 132a-133a.

4. The court of appeals then reheard the case en banc, reaching largely the same result by a six-to-five vote. Pet. App. 1a-121a.

a. The en banc majority agreed with the original panel's conclusion that the DEA lacks authority to effect arrests or otherwise enforce United States law outside the United

States, even where the statute being enforced applies extraterritorially. The majority agreed that this Court's decision in *United States* v. *Bowman*, 260 U.S. 94 (1922), renders the general presumption against extraterritorial application of United States laws inapplicable to "criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated." Pet. App. 36a (quoting *Bowman*, 260 U.S. at 98). The majority thus had "no doubt that the substantive criminal statutes under which [respondent] was charged apply to acts occurring outside the United States." *Ibid.*

The majority, however, rejected the government's argument that DEA agents have authority to enforce federal statutes outside the United States. Pet. App. 38a. "Congress may have intended the reach of a criminal statute to extend beyond our borders," the court stated, but that does "not mean that Congress also intended to give federal law enforcement officers unlimited authority to violate the territorial sovereignty of any foreign nation to enforce those laws, or to breach international law in doing so." *Ibid.* The court accordingly rejected the government's contention that 21 U.S.C. 878(a)(3), which places no express territorial limits on the DEA's arrest authority, gives DEA agents enforcement authority with the same geographic scope as the laws they are charged with enforcing. Pet. App. 40a-41a. Instead, the court invoked the presumption against extraterritoriality and distinguished *Bowman*: Because the arrest authority provided by Section 878 is a regulation of "executive authority, not criminal conduct," the court declared that the provision cannot "be classified as a criminal statute[] which [is] . . . not logically dependent on [its] locality for the Government's jurisdiction." *Id.* at 41a-42a (quoting *Bowman*, 260 U.S. at 98). The court stated that it was unwilling to assume that Congress had "turned a blind eye to the interests of equal sovereigns and the potential violations of

international law that would inevitably ensue" from the contrary construction. *Id.* at 46a-47a.

The majority stressed that it was not questioning "the powers of the political branches to override the principles of sovereignty in some circumstances, should the need arise." Pet. App. 47a. But the court declared that it would not "impute such an intent where it is not expressed." *Ibid.* Consequently, the majority held that it would not permit extraterritorial enforcement, even of those laws that apply to purely extraterritorial conduct, "absent a clear directive" from Congress. *Id.* at 50a.

While holding respondent's arrest to be "false" precisely because it occurred in Mexico, the court of appeals concluded that the arrest was actionable notwithstanding the FTCA's exclusion of claims "arising in a foreign country." Pet. App. 65a-68a. The claim, the en banc majority held, fell within the "headquarters doctrine" because respondent's seizure was planned and coordinated in the United States. *Id.* at 66a-67a. Agreeing with the reasoning of the original panel opinion, the majority also rejected the claim that the seizure could be deemed a valid citizen's arrest under California law. *Id.* at 70a-72a.

Finally, the en banc court affirmed the judgment against Sosa. Disagreeing with the panel opinion, the majority held that there is no specific, universal, and obligatory rule of international law according individuals a personal right to be free of transborder arrests. Pet. App. 21a-27a. But the en banc majority held that there is a specific, universal, and obligatory rule of international law prohibiting "arbitrary arrest." *Id.* at 28-30a. In this case, the court held that respondent's arrest was "arbitrary" because it was authorized neither by United States nor Mexican law. *Id.* at 33a.[2]

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[2] Sosa filed a separate petition, No. 03-339, challenging the judgment against him under 28 U.S.C. 1350. Certiorari was granted in that case on December 1, 2003, as well, and it has been consolidated with this case.

b. Judge Fisher filed a concurring opinion, joined by Judges Schroeder, Goodwin, Thomas, and Paez. Pet. App. 73a-80a. Judge Fisher, while fully joining the majority opinion, concluded that the DEA agents lacked authority to conduct this arrest because "neither Congress nor the Executive has expressed an intent to allow sub-Cabinet-level law enforcement officials in the DEA to be the final arbiters of" extraterritorial arrest determinations. *Id.* at 73a. Judge Fisher stated that, although "Congress may have intended a criminal statute to reach conduct that occurs beyond our borders, and that United States courts would have jurisdiction over such crimes, [that] does not mean that Congress also intended to give law enforcement officers unlimited authority to enforce the statute by entering a foreign nation, uninvited, to abduct a foreign national, in violation of international law." *Id.* at 79a.

c. Judge O'Scannlain dissented in an opinion joined by Judges Rymer, Tallman, and Kleinfeld. Pet. App. 80a-108a. Judge Gould dissented separately. *Id.* at 108a-121a. Judge O'Scannlain's dissent began:

> We are now in the midst of a global war on terrorism, a mission that our political branches have deemed necessary to conduct throughout the world, sometimes with tepid or even non-existent cooperation from foreign nations. With this context in mind, our court today commands that a foreign-national criminal who was apprehended abroad pursuant to a legally valid indictment is entitled to sue our government for money damages. In so doing, and despite its protestations to the contrary, the majority has left the door open for the objects of our international war on terrorism to do the same.

Id. at 80a. The dissenting judges all agreed with the government's position that "the DEA was well within its delegated powers when arresting Alvarez." Pet. App. 103a (O'Scannlain, J., dissenting); *id.* at 120a n.7 (Gould, J. dis-

senting) ("I agree with Judge O'Scannlain's dissenting opinion that federal law authorized the DEA agents' conduct.").

The relevant statutory provisions, Judge O'Scannlain explained, confer on DEA agents the authority to "make arrests . . . *for any felony*, cognizable under the laws of [the] United States" as well as authority to "perform such other law enforcement duties as the Attorney General may designate," without specifying geographic scope. Pet. App. 103a (quoting 21 U.S.C. 878(a)). "Because it is undisputed that Congress has authorized the extraterritorial application of the criminal statutes for which [respondent] was charged, this broad legislative delegation of enforcement powers to the DEA would seemingly sanction the extraterritorial arrests at issue in this case." *Ibid.* "Congress engaged in such a broad delegation of law enforcement authority to the DEA and to the Attorney General in order to allow the Executive branch to have the widest array of enforcement options at its disposal." *Id.* at 104a.

The majority's contrary decision, Judge O'Scannlain observed, leads to the anomalous result of a federal criminal prohibition that no Executive Branch official can enforce:

> [I]f Congress through enactment of 21 U.S.C. § 878(a) has not in fact authorized the DEA and Attorney General to enforce extraterritorially the criminal laws for which [respondent] was charged, to whom exactly has Congress delegated this enforcement authority? By extending the reach of our criminal laws to apply to conduct outside of the nation's borders, Congress must have intended to have the laws enforced by some member of the Executive branch.

Pet. App. 105a.

Congress thus authorized "arrest, without warrant," when "there is probable cause to suspect violation of an extraterritorially applicable statute," in order to afford "the Executive, which already possesses the general responsibility for deciding both when and whether to arrest and to prose-

cute and how best to conduct the nation's foreign relations, the burden of determining when the national interest requires bypassing diplomatic channels to secure" arrests abroad. *Id.* at 101a. Judge O'Scannlain concluded:

> The decision to exercise the option of transborder arrest as a tool of national security and federal law enforcement is for the political branches to make. They, unlike the courts, may be held accountable for any whirlwind that they, and the nation, may reap because of their actions. By its judicial overreaching, the majority has needlessly shackled the efforts of our political branches in dealing with complex and sensitive issues of national security.

Id. at 108a.

In a separate dissent, Judge Gould concluded that the case "presents a nonjusticiable political question." Pet. App. 108a. He explained that the decision to order the capture of a foreign national on foreign soil involves delicate foreign policy questions, such as whether "the need to prosecute [respondent] for the torture and murder of an American official justif[ies] the United States's taking actions that might offend Mexico's government." *Id.* at 114a. By engaging that issue, he observed, "the majority transforms the executive branch's foreign policy decisions into occasions for judicial review." *Id.* at 117a. "[I]f the judiciary is to preserve its legitimacy, to show the respect due coordinate branches of government, and to avoid interfering in our nation's foreign relations," he added, "judges must show more restraint than the majority shows today." *Id.* at 120a-121a.

SUMMARY OF ARGUMENT

I. A. The Ninth Circuit's decision in this case holds the United States liable in damages for arresting an indicted torture-murder suspect on probable cause in Mexico because, according to the Ninth Circuit, DEA agents do not have statutory authority to effect arrests outside the United States. That decision cannot be reconciled with the text, history, or purposes of 21 U.S.C. 878, which authorizes DEA

agents to "make arrests without warrant * * * for any felony, cognizable under the laws of the United States." 21 U.S.C. 878(a)(3). That broad language places no geographic limits on the DEA's arrest authority, and the statute's history contradicts any intent to impose such limits.

Congress, moreover, has enacted numerous statutes that apply to conduct that occurs wholly abroad. Thus, many "felon[ies] cognizable under" United States law can be committed outside the United States, and felons committing crimes here may flee the country. As a result, it is neither logical nor appropriate to read Section 878 as limiting the Executive Branch's constitutional authority to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, Cl. 4, by effecting arrests abroad when, in the exercise of that Branch's law enforcement and foreign relations authority, it deems such arrests necessary and prudent. Where Congress has deemed it appropriate to circumscribe the Executive's authority to effect arrests abroad, it has done so explicitly and with careful consideration of the need to preserve the Executive's flexibility. See, *e.g.*, 22 U.S.C. 2291(c)(1). Those limits would be largely superfluous if the DEA and other federal agencies had no legal authority to arrest outside the United States in the first place.

B. The Ninth Circuit erred by engrafting an extra-textual territorial limit on DEA arrest authority based on the presumption against extraterritorial application of United States law. As an initial matter, that presumption cannot be used to defeat Congress's unmistakable intent. In any event, under cases such as *United States* v. *Bowman*, 260 U.S. 94 (1922), and *Maul* v. *United States*, 274 U.S. 501 (1927), the presumption does not apply to Executive Branch authority to enforce federal law. If criminals violating our laws "could escape seizure by departing from or avoiding" the United States, the criminal laws "would be of little practical effect in checking violations, and it is most improbable that Congress intended to leave the avenues of escape thus unguarded." *Maul*, 274 U.S. at 511. Furthermore,

applying the presumption in this context to limit the Executive Branch's options in conducting foreign relations would defeat its purpose of avoiding conflicts with foreign powers. While foreclosing the use of DEA agents to effect arrests abroad, the Ninth Circuit's decision would permit the Executive to seize suspects through the use of military force, an approach that is more likely to generate tension with—and less likely to draw consent from—foreign powers. Extraterritorial arrests without the cooperation of the relevant foreign government, of course, are extremely rare. But Section 878 entrusts determinations regarding the appropriate degree and type of foreign government cooperation to the Executive Branch.

C. The Ninth Circuit not only improperly denied DEA agents statutory authority to effect arrests abroad, but also stripped them of their authority to make citizen's arrests. The longstanding rule is that law enforcement officers acting outside their jurisdiction have the same authority to make arrests as ordinary citizens. By refusing to accord federal agents that authority, the Ninth Circuit disfavored them because they are federal officers and disregarded the Federal Tort Claims Act's directive that the government shall be liable only to the extent that a private person would be liable in like circumstances. 28 U.S.C. 1346(b)(1), 2674.

II. At the same time it denied Executive Branch officials authority to effect arrests abroad, the Ninth Circuit ignored an express limit on its own jurisdiction to entertain claims for money damages challenging such arrests. Under 28 U.S.C. 2860(k), the United States cannot be held liable under the FTCA for "any claim arising in a foreign country." This case not only concerns an arrest abroad, but one that is alleged to be "false" *solely because* it occurred abroad. By holding that the judicially crafted "headquarters doctrine" permits this case to proceed nonetheless, the Ninth Circuit effectively read Section 2680(k)'s foreign country exception out of the statute. Finally, by construing its own adjudicative authority in matters touching on foreign affairs broadly

and the Executive's law enforcement authority in such matters parsimoniously—ignoring an express geographic restriction on judicial authority while engrafting a geographic restriction on Executive authority onto a statute that contains none—the Ninth Circuit inverted traditional separation of powers and statutory construction principles.

ARGUMENT

RESPONDENT'S ARREST IN MEXICO NEITHER VIOLATES FEDERAL LAW NOR IS ACTIONABLE UNDER THE FEDERAL TORT CLAIMS ACT

The Ninth Circuit en banc majority in this case concluded that the United States may be required to pay damages because of the conduct of DEA agents in arresting, in Mexico, a criminal suspect who had been properly indicted by a grand jury on probable cause to believe that he participated in the torture and murder of a federal agent. With considerable understatement, the Ninth Circuit conceded that "a grand jury had already indicted [respondent] and an American arrest warrant had been issued" before respondent's arrest, "giving this case a unique factual twist when compared to traditional false arrest cases." Pet. App. 63a. But the Ninth Circuit nonetheless concluded that respondent's arrest was "false" and thus actionable under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, because federal officers charged with enforcing the Nation's laws—including laws that expressly apply to conduct occurring wholly outside the United States—lack authority to effect arrests abroad. At the same time that it held the arrest to be "false" solely because it occurred abroad, the Ninth Circuit held that this suit challenging the arrest was not precluded by the FTCA's exception for "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k).

Those two holdings are not merely difficult to reconcile. They also misconstrue the statutes governing federal arrest authority and inappropriately impede efforts to protect this Nation's security through enforcement of its criminal laws.

Congress granted DEA agents authority to "make arrests without warrant" on probable cause "for *any* felony, cognizable under the laws of the United States" without specifying geographic limits. 21 U.S.C. 878(a)(3) (emphasis added). That language is not naturally read as confined to arrests inside the United States. Congress has enacted numerous criminal prohibitions that apply to conduct taking place wholly abroad. It should not be presumed that Congress, while enacting those provisions and authorizing arrests for "any felony," chose to deny the Nation's law enforcement agencies necessary authority to enforce them. Indeed, where the Legislative Branch has in specific circumstances deemed it appropriate to restrict the Executive's law enforcement authority by barring extraterritorial arrests, it has done so expressly. Those statutory limits would be largely superfluous if DEA and other federal agents did not have legal authority to arrest abroad in the first place.

The Ninth Circuit's contrary holding, under which federal agents lack statutory authority to engage in law enforcement activities outside the United States even *with* the "consent or assistance of the host country," Pet. App. 35a & n.24, threatens the United States' ability to conduct law enforcement operations abroad to combat terrorism and international crime. It provides terrorists and other criminals who hide in countries unwilling or unable to apprehend them using their own officers—including countries that may tacitly approve of involving U.S. law enforcement officers to effect an arrest but will not acknowledge that publicly—a safe harbor despite the fact that their actions are subject to United States laws and harm United States interests. Nothing in the relevant statutes supports that counter-intuitive result.

The Constitution assigns to the Executive Branch the duty to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, Cl. 4, and primary responsibility for foreign relations, U.S. Const. Art. II, § 2; *Department of the Navy* v. *Egan*, 484 U.S. 518, 529-530 (1988) (reiterating "the

generally accepted view that foreign policy [is] the province and responsibility of the Executive") (quoting *Haig* v. *Agee*, 453 U.S. 280, 293-294 (1981)). Given that constitutional allocation of responsibility, it is inappropriate for federal courts lightly to infer congressional intent to intrude on the Executive's traditionally broad discretion in matters relating to law enforcement and foreign relations.

At the same time the Ninth Circuit read the Executive Branch's arrest authority narrowly to impose a geographic restriction found nowhere in the statutory text, that court expansively construed its own authority to adjudicate the legality of conduct abroad despite the FTCA's express exclusion of "any claim arising in a foreign country," 28 U.S.C. 2680(k). In this case, the Ninth Circuit held that the judicially crafted "headquarters exception" gave it authority to pass on the legality of respondent's arrest in Mexico because officials in the United States arranged the arrest, even though no tortious act was committed here. That expansive view of judicial authority effectively nullifies the exception for "any claim arising in a foreign country." It inappropriately intrudes into the Executive's control over foreign affairs. And it would routinely interpose the judiciary into matters of foreign policy where Executive Branch authority is at its apogee.

I. Section 878 Permits DEA Agents To Arrest For Any Felony Cognizable Under U.S. Law Wherever The Executive Deems Enforcement Appropriate

Section 878(a)(3) of Title 21 of the United States Code authorizes any DEA agent to "make arrests without warrant * * * for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony." 21 U.S.C. 878(a)(3). Notwithstanding that authority, the Ninth Circuit held that the United States may be held liable in tort for "false arrest" under the FTCA for the seizure of an indicted torture-murder suspect in Mexico

because, according to that court, DEA agents have "no authority under federal law to execute an extraterritorial arrest" under any circumstances. Pet. App. 70a; see *id.* at 35a n.24.

The FTCA accords "district courts * * * jurisdiction of civil actions on claims against the United States, * * * for personal injury * * * if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," subject to certain exceptions and limits. 28 U.S.C. 1346(b)(1); see 28 U.S.C. 2674 (similar). Applying California law to respondent's arrest in Mexico, see pp. 46-47, *infra*, the Ninth Circuit recognized that, where authorized by federal law, the arrest of an indicted suspect on probable cause cannot be a "false arrest" under California tort law. See Pet. App. 69a-70a. But that court erred in holding that DEA agents have no authority to effect extraterritorial arrests. Section 878 by its terms imposes no such geographic limits. Particularly when read in connection with other provisions of federal law, Section 878 unmistakably authorizes arrests abroad wherever and whenever the Executive Branch, consistent with its authority over federal law enforcement and matters of foreign policy, deems them necessary and prudent.

A. Section 878 Grants Federal Officers Authority To Enforce The Law Where And When The Executive Branch Deems Such Enforcement Prudent

1. *Section 878's Text, Purpose, And History Make The Scope Of Enforcement Authority Clear*

Congress has long recognized that criminals have no more respect for national boundaries than they do for the criminal laws. Today more than ever, crime is a transnational phenomenon. With increasing frequency, criminals and criminal organizations can plan and even execute attacks on U.S. interests while operating entirely abroad. For that reason, Congress has enacted criminal statutes that extend to wholly extraterritorial conduct. See, *e.g.*, 18 U.S.C. 1119

(murder of U.S. national in a foreign country); 18 U.S.C. 2332b (foreign terrorist activity); 18 U.S.C. 175 (extraterritorial use of biological weapons); 18 U.S.C. 351, 1751 (crimes committed against high government officials); 18 U.S.C. 1956 (extraterritorial money laundering); 18 U.S.C. 2339B (providing assistance to foreign terrorist organizations); 18 U.S.C. 1116(c) (attacks on diplomats); 18 U.S.C. 1203(b)(1) (hostage taking); 49 U.S.C. 46505 (carrying weapons or explosives aboard aircraft); 50 U.S.C. 424 (extraterritorial jurisdiction over crimes relating to releasing national security information). In this case, for example, respondent was indicted for the kidnapping of a protected United States government employee in violation of 18 U.S.C. 1201(a)(5), (c), a statute that expressly applies to acts outside the United States.

Because United States law often proscribes conduct that may take place entirely abroad and because criminals committing crimes here may seek refuge in foreign countries, the Executive Branch's authority to "take Care that the Laws be faithfully executed" may require the performance of law enforcement activities abroad. See *United States* v. *Yousef*, 327 F.3d 56, 86 (2d Cir.) (It is "beyond doubt * * * [that] Congress has the authority to 'enforce its laws beyond the territorial boundaries of the United States.'") (quoting *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)), cert. denied, 124 S. Ct. 353 and 492 (2003). Consistent with that constitutional responsibility, the statutes codifying the arrest powers of federal law enforcement agencies use broad and inclusive language without specifying geographic boundaries. The Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended, authorizes a DEA agent to "make arrests without warrant * * * *for any felony, cognizable under the laws of the United States*, if he has probable cause to believe that the person to be arrested has committed or is committing a felony." 21 U.S.C. 878(a)(3) (emphasis added). The statute further authorizes the DEA to "perform such other law enforcement duties as

the Attorney General may designate." 21 U.S.C. 878(a)(5). The FBI's organic statute is phrased similarly. It authorizes the Bureau's agents to "make arrests without warrant for any offense against the United States committed in their presence, *or for any felony cognizable under the laws of the United States* if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." 18 U.S.C. 3052 (emphasis added).

Those provisions, which do not include geographic restrictions, are not naturally read to impose territorial limits on the broad arrest authority they grant. To the contrary, Section 878(a)(3) authorizes arrests for "*any* felony, *cognizable under the laws of* the United States"—not arrests of felony suspects "found in the territory of the United States." Many "felon[ies] cognizable under the laws of the United States" arise under statutes that apply extraterritorially and can be committed wholly abroad. The plain text of Section 878 thus clearly authorizes Executive Branch officials to make arrests for felonies committed abroad and for felonies committed here when the suspect has fled the country. In practice, such authority is rarely invoked in the absence of cooperation from the relevant foreign government, and only with due regard for considerations of foreign policy and international practice. But the Ninth Circuit's ruling would proscribe such arrests even with the foreign government's express consent. Pet. App. 35a & n.24.

That construction of Section 878—under which federal officers cannot effect arrests abroad—implausibly assumes that Congress, while authorizing arrests for "any felony" and enacting criminal prohibitions applicable to conduct taking place solely abroad, chose to deny the Executive Branch authority to enforce those criminal laws. As Judge O'Scannlain observed:

> [I]f Congress through enactment of 21 U.S.C. § 878(a) has not in fact authorized the DEA and Attorney General to enforce extraterritorially the criminal laws for

> which [respondent] was charged, to whom exactly has Congress delegated this enforcement authority? By extending the reach of our criminal laws to apply to conduct outside of the nation's borders, Congress must have intended to have the laws enforced by some member of the Executive branch.

Pet. App. 105a (dissenting opinion). Nearly two centuries ago, this Court made a similar point when construing the scope of the national government's constitutional authority:

> To impose * * * the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs.

M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316, 424 (1819). There is simply nothing in Section 878 to suggest that Congress sought to impose that sort of impediment here.

To the contrary, Congress was unquestionably aware that, in authorizing arrests for "any felony" cognizable under United States law, it was authorizing arrests abroad. Section 878 was intended to "provide[] the Attorney General with flexibility in the utilization of enforcement personnel *wherever and whenever the need arises*." H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1, at 54 (1970) (emphasis added). Congress specifically recognized the international scope of the drug problem the DEA must address. See *id.* at 18 (regulating drugs pursuant to Congress's "foreign commerce power"); *id.* at 78 (discussing extraterritorial aspects of the drug problem); *id.* at 71-72 (enacting provisions governing importation of illegal drugs). And Congress expressed its intent that the "illegal traffic in drugs should be attacked with the full power of the Federal Government." *Id.* at 9.

Indeed, the history of the DEA and its international mission belies the suggestion that the DEA's law enforce-

ment powers are limited to domestic activities. The DEA was established in 1973 as the successor to the Bureau of Narcotics and Dangerous Drugs (BNDD), a division of the Justice Department that was then exercising international responsibilities in the global effort to stem the flow of dangerous drugs into this country. See Message from the President Transmitting Reorganization Plan No. 2 of 1973, H.R. Doc. 69, 93d Cong., 1st Sess. 5-6 (1973) (explaining plan to transform BNDD into the DEA and recognizing the "rapidly developing international activities" of the BNDD); see also DEA History Book <http://www.usdoj.gov/dea/pubs/history/deahistory_01.htm#> (last visited Jan. 20, 2004) (listing foreign drug enforcement offices opened since 1960). The President's reorganization plan was designed to expand that international role—not reduce it—while consolidating the previously fractured drug enforcement responsibilities shared by the Customs and other Departments into a single agency. In explaining the change, the President declared "all-out, global war on the drug menace," H.R. Doc. 69, *supra*, at 3, and explained the advantages of consolidating "worldwide drug law enforcement responsibilities," *id.* at 5-6. The reorganization plan, the President also observed, "could be especially helpful on the international front" and "enhance the effectiveness" of "wide-ranging effort[s] to cut off drug supplies before they ever reach U.S. borders or streets." *Ibid.* Consistent with the reorganization and the announced policies, Congress in 1979 enacted technical amendments to Section 878 to substitute the DEA for the BNDD as the relevant agency, without modifying the agency's mission or goals. See Pub. L. No. 96-132, § 16(b), 93 Stat. 1049; H.R. Rep. No. 628, 96th Cong., 1st Sess. 23 (1979).

Moreover, when Congress enacts statutes of extraterritorial application, it anticipates the possibility of extraterritorial enforcement through arrest. The comments of Senator Specter on the enactment of 18 U.S.C. 2332, which criminalizes certain acts directed against U.S. nationals abroad, are illustrative:

> Yet, if the terrorist is hiding in a country * * * where the government, such as it is, is powerless to aid in his removal, or * * * where the government is unwilling, we must be willing to apprehend these criminals ourselves and bring them back for trial.

131 Cong. Rec. 18,870 (1985).

2. *The Ninth Circuit's Construction Is Inconsistent With Other Statutory Provisions Governing Arrest Authority Abroad*

The Ninth Circuit's view that Section 878 withholds extraterritorial arrest authority is impossible to reconcile with other provisions of law governing the arrest authority of federal officers. In particular, by reading Section 878's broad authorization as an implicit limit on extraterritorial arrests, the Ninth Circuit robbed the explicit (but narrow) statutory restrictions on that authority in the Mansfield Amendment, 22 U.S.C. 2291(c), of any independent meaning. Enacted in 1976 in response to the DEA's then longstanding practice of participating in foreign law enforcement operations, including arrests abroad, the Mansfield Amendment provides that "[n]o officer or employee of the United States may directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts." 22 U.S.C. 2291(c)(1). The Amendment provides a number of exceptions. It "does not prohibit an officer or employee of the United States, with the approval of the United States chief of mission," such as the U.S. Ambassador, "from being present when foreign officers are effecting an arrest or from assisting foreign officers who are effecting an arrest." 22 U.S.C. 2291(c)(2). And it "does not prohibit an officer or employee from taking direct action to protect life or safety" where unanticipated "exigent circumstances arise." 22 U.S.C. 2291(c)(3).

Critically, Congress did not prohibit all arrests abroad. Nor did Congress proscribe the arrest at issue here. This arrest was not effected "directly" by United States officials,

but by foreign nationals. See Pet. App. 139a, 164a n.5, 167a, 216-217a. It was not "part of any foreign police action."[3] And, far from being effected in connection with "narcotics control efforts," it was conducted to bring to justice an individual who had participated in the torture-murder of a federal agent. The fact that Congress expressly proscribed certain foreign arrests by federal officials, but excluded the arrest at issue here from that prohibition, speaks volumes about its intent. See also *United States* v. *Zabaneh*, 837 F.2d 1249, 1261 (5th Cir. 1988) (Congress did not provide "sanctions or penalties by way of relief for persons arrested in contravention of § 2291(c)(1)").

More fundamentally, if Section 878 and other statutes denied federal agents any authority to conduct arrests abroad, the Mansfield Amendment's more narrow prohibition on the "direct effect[uation]" of such arrests "as part of any foreign police action with respect to narcotics control efforts" would be surplusage, and misleading surplusage at that. This Court, of course, is properly "reluctant to adopt a construction making another statutory provision superfluous." *Hohn* v. *United States*, 524 U.S. 236, 249 (1998) (citing *Kawaauhau* v. *Geiger*, 523 U.S. 57, 62 (1998)); *J.E.M. AG Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-144 (2001) ("[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."); *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955); cf. *United States* v. *Zacks*, 375 U.S. 59, 67-68

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[3] Although the phrase "as part of [a] foreign police action," if read in isolation, might encompass either (a) a police action in a foreign country by United States officials or (b) a police action by the police of a foreign country, in context it is clear that the latter reading is correct. The Mansfield Amendment applies to "arrest[s]" effected by U.S. officials "in any foreign country as part of [a] foreign police action." Reading the phrase "foreign police action" to mean only that U.S. law enforcement officers are engaging in law enforcement activities abroad would make that phrase surplusage.

(1963) ("When there are two acts upon the same subject, the rule is to give effect to both if possible.").

Furthermore, as would be expected of any limit on an already established and sometimes necessary executive authority, the Mansfield Amendment includes exceptions to account for exigent circumstances, 22 U.S.C. 2291(c)(3), or situations in which the power's exercise is consistent with the diplomatic interests of the United States, 22 U.S.C. 2291(c)(2). The Ninth Circuit's construction of Section 878 is harder still to reconcile with those exceptions, which would make no sense and be wholly inoperative if federal agents (and DEA agents charged with narcotics control efforts in particular) lacked authority to make arrests abroad in the first place. An exception to a limitation (such as the exception for exigent circumstances) is not itself an affirmative authorization, but rather strongly suggests the existence of a broad, affirmative authorization elsewhere in the law (here, in Section 878). Accordingly, while the Ninth Circuit's analysis renders the Mansfield Amendment confusing surplusage, the more natural reading of Section 878 is reinforced by the Amendment.

This Court has explained that federal courts should adopt the "permissible meaning" of a statute "which fits most logically and comfortably into the body of both previously and subsequently enacted law," not necessarily because such an "accommodative meaning" is "what the lawmakers must have had in mind," but because it is the role of the federal courts "to make sense rather than nonsense out of the *corpus juris*." *West Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100-101 (1991). In this case, the Ninth Circuit needlessly made the law self-contradictory by rejecting the more natural reading of the grant of arrest authority in Section 878, thereby rendering the specific prohibitions and exceptions in the Mansfield Amendment both superfluous and confusing.

To the extent that any doubt regarding Congress's intent could remain, the history of the Mansfield Amendment erases it. That Amendment was adopted primarily in

response to the *DEA's practice*—then accepted as lawful by all—of engaging in narcotics enforcement arrests abroad in combination with foreign police forces. The Amendment's sponsors specifically noted that, as of 1976, there were 365 DEA officials serving abroad, and that many such officials "participat[ed] in raids and other such activities alongside local police officials" because the then-existing law provided "no prohibition on U.S. involvement in local drug raids or other law enforcement actions." 122 Cong. Rec. 2592 (1976) (comments of Sen. Mansfield); see also pp. 21-22, *supra* (actions of predecessor agency); pp. 33-34, *infra* (extraterritorial investigatory authority). Discussing the DEA's opposition to the imposition of a new restriction on its arrest authority, Senator Mansfield represented that the Amendment would be beneficial for DEA agents who "have had nothing to guide them heretofore." *Id.* at 2593; see *ibid.* (compromise legislation was "worked out with the DEA") (comments of Sen. Percy); *id.* at 3635 (objecting to amendment because the "DEA's involvement overseas" has increased "seizures of illicit drugs and arrests of international drug traffickers") (comments of Sen. Hruska). Rather than proscribe DEA agents from effecting any arrests abroad, Congress barred only the category of otherwise lawful arrests thought to be both problematic and unnecessary —those effected "directly" by U.S. agents abroad, as part of a "foreign police action," in connection with "narcotics control efforts."[4]

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[4] As originally proposed, the Mansfield Amendment would have prohibited government personnel from conducting *any* police activities abroad in furtherance of narcotics control. See S. Rep. No. 605, 94th Cong., 2d Sess. 54-55 (1976). Congress's decision to enact a narrower statute—reaching only arrests as part of ongoing foreign police operations—reflects Congress's decision to interfere with Executive discretion only where the foreign nation is already willing to act through its own law enforcement personnel, rendering the involvement of United States officials and the risk of injury or international conflict therefrom unnecessary. See 122 Cong. Rec. at 2591 (comments of Sen. Percy) ("Senator Mansfield's amendment is designed solely to prevent American

Other statutes also plainly envision law enforcement operations by United States agents acting abroad; they too would make little sense if such actions were, in fact, *ultra vires*. For example, Congress has authorized the military to provide equipment and assistance to federal law enforcement officers in a variety of extraterritorial operations, including those designed to effect the "rendition of a suspected terrorist from a foreign country to the United States to stand trial." 10 U.S.C. 374(b)(1)(D). Such authority would serve no purpose if Congress had not conferred extraterritorial law enforcement powers upon federal law enforcement agencies and if, as the Ninth Circuit held, the military were the sole tool available to the Executive to effect extraterritorial arrests.

B. The Presumption Against Extraterritoriality Does Not Support The Ninth Circuit's Decision

The Ninth Circuit nowhere disputed that the text of Section 878 accords DEA agents broad arrest authority without specifying geographic limits. That court, however, imposed a geographic restriction itself by invoking the presumption against extraterritorial application of United States laws. Pet. App. 41a-42a; see *EEOC* v. *Arabian Am. Oil. Co.*, 499 U.S. 244, 248 (1991) (*Aramco*). That was error. As an initial matter, the presumption against extraterritorial application

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involvement where it is unnecessary to our own domestic drug law enforcement programs and where friction with foreign governments is likely to result."); H.R. Rep. No. 1144, 94th Cong., 2d Sess. 54-55 (1976) (noting that the provision was intended "to avoid involvement by U.S. personnel in foreign police operations where violence or the use of force could reasonably be anticipated" and that U.S. ambassadors were to monitor narcotics control activities abroad to ensure "that U.S. personnel do not become involved in sensitive, internal law enforcement operations which could adversely affect U.S. relations with that country"); see also *United States* v. *Green*, 671 F.2d 46, 53 n.9 (1st Cir.) ("[T]he legislative history of the provision makes it clear that it was only intended to 'insure that U.S. personnel do not become involved in sensitive, internal law enforcement operations which could adversely affect U.S. relations with that country.'"), cert. denied, 457 U.S. 1135 (1982).

is just that—a presumption—a "canon of construction * * * whereby *unexpressed* congressional intent may be ascertained." *Aramco*, 499 U.S. at 248 (quoting *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949)) (emphasis added). It is not a license to defeat Congress's clearly expressed will. See *Foley Bros.*, 336 U.S. at 285 (presumption that "legislation * * * is meant to apply only within the territorial jurisdiction of the United States" may be invoked "*unless* a contrary intent appears") (emphasis added). In this case, Section 878's text, history, and purpose confirm that Congress did not confine the authority of DEA agents to arrest for "any felony cognizable under the laws of the United States" to felons who are found in the United States. To the contrary, because many "felon[ies] cognizable under the laws of the United States" can be committed wholly abroad, and because Congress established explicit limits on the DEA's extraterritorial arrest authority in other statutes, Congress's provision of authority to arrest for "any felony" authorizes extraterritorial arrests with sufficient clarity to overcome any contrary presumption. That is particularly true in light of DEA's "worldwide drug enforcement responsibilities." H.R. Doc. 69, *supra*, at 5-6; see p. 22, *supra*.

In any event, the presumption against extraterritoriality does not apply to statutes, such as Section 878, which are designed to accord the Executive Branch authority to address criminal conduct with an international dimension. Nor does invoking the presumption in such cases serve its underlying purpose of avoiding conflicts with foreign powers. Indeed, by employing the presumption to restrict the discretion of the Executive Branch in matters of foreign policy, the Ninth Circuit's decision denies that Branch necessary flexibility and remits it to options—such as the use of the Nation's *armed forces*—which are less likely to invite foreign government consent and more likely to provoke international strife.

1. *The Presumption Against Extraterritoriality Is Not Applicable To Statutes Granting Authority To Enforce The Nation's Criminal Laws*

Unlike the Ninth Circuit's nearly reflexive application of the presumption against extraterritorial application of United States law, this Court's cases carefully distinguish between those situations where the presumption is likely to reflect Congress's intent and those situations where it is not. For example, over 80 years ago, this Court held that the presumption is inapplicable to criminal statutes that do not logically depend on locality for their operation. See *United States* v. *Bowman*, 260 U.S. 94, 98 (1922) (explaining that the general presumption against extraterritorial application does not apply to those "criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction"); see also *Yousef*, 327 F.3d at 87-88. The enforcement of such a criminal statute abroad reflects the judgment of two different branches of government—the Legislature's determination to regulate conduct affecting critical United States interests regardless of the conduct's locality, and the Executive's judgment that extraterritorial enforcement action is warranted in particular cases.

For similar reasons, this Court has likewise declined to apply the presumption against extraterritoriality to statutes that grant the Executive Branch authority to enforce the law. See, *e.g.*, *Maul* v. *United States*, 274 U.S. 501 (1927) (relying on *Bowman* to construe ambiguous statute to permit extraterritorial seizures on the high seas). That approach makes sense. The government's interest in enforcing federal law and bringing criminals to justice does not, as a logical matter, end at the Nation's borders. Nor does it terminate merely because the suspect flees or remains abroad. To the contrary, Congress has made the international scope of the United States' law enforcement interests apparent by its frequent decision to extend its criminal laws (including the ones respondent was charged with violating) to conduct committed wholly abroad. Given the scope of the United

States' criminal laws and the government's interest in apprehending those who violate our laws but seek refuge abroad, it is not logical to read the enforcement authority of the Executive Branch as terminating at the border.

Although acknowledging *Bowman*'s applicability to *substantive* criminal prohibitions, the court of appeals refused to apply *Bowman* in this case because "Section 878(a) regulates executive authority, not criminal conduct." Pet. App. 41a-42a. But the fact that Section 878 grants discretionary law enforcement authority to the Executive Branch—the Branch of government responsible for the conduct of this Nation's foreign relations—merely underscores the inapplicability of the presumption against extraterritoriality, for Congress reasonably relies on the Executive Branch to exercise its discretionary powers consistent with foreign policy considerations. In cases involving a private party's efforts to apply an ambiguous statute abroad, the presumption against extraterritoriality avoids unintended interference with the political Branches' conduct of foreign policy. When it is the Executive itself seeking to enforce a federal statute abroad, those concerns are inapplicable. See pp. 35-40, *infra*. Particularly in this area, it is not appropriate for the judiciary to restrict the Executive's exercise of its sound discretion based on statutory silence.

In any event, the Ninth Circuit's refusal to apply *Bowman* to statutes granting the Executive Branch seizure authority is inconsistent with this Court's decision in *Maul* v. *United States*, *supra*, which addressed the authority of revenue cutters—customs enforcement vessels—to arrest suspected violators on the high seas. By longstanding tradition, revenue cutters had been assigned to particular "districts" in United States territorial waters, 274 U.S. at 509-510, and Congress had reflected that practice by authorizing revenue cutter officers to make certain seizures "as well without as within their respective districts," *id.* at 510. The Court agreed that the statutory language was ambiguous and might be read as authorizing seizures only "within other cus-

todial districts" and thus to exclude extraterritorial seizures in "the sea outside customs districts." *Id.* at 510-511. But the Court rejected that construction, holding that Congress had granted extraterritorial arrest authority. If vessels "violating the revenue laws * * * could escape seizure by departing from or avoiding waters within customs districts," the Court explained, "the liability * * * would be of little practical effect in checking violations; and it is most improbable that Congress intended to leave the avenues of escape thus unguarded." *Id.* at 511. Citing *Bowman*—and not the presumption against extraterritoriality—the Court thus upheld extraterritorial seizure authority. *Ibid.* Justice Brandeis (joined by Justice Holmes) similarly observed: "If the officers of revenue cutters were without authority to seize American merchant vessels found violating our laws on the high seas beyond the twelve-mile limit, or to seize such vessels found there which are known theretofore to have violated our laws without or within those limits," then "many offenses against our laws might, to that extent, be committed with impunity." 274 U.S. at 520 (Brandeis, J., concurring).

The same reasoning applies here (particularly given that the DEA inherited responsibilities previously held by the Customs Department). By engrafting a territorial limit onto the DEA's statutory arrest authority, the Ninth Circuit implausibly presumed that Congress meant to extend the reach of substantive criminal law outside the United States, while denying the Executive Branch authority to enforce those laws abroad. The decision thus would appear to foreclose federal law enforcement agents encountering Bin Laden in Afghanistan before the September 11, 2001, attacks, for example, from seizing him, even with that foreign nation's express or tacit consent. It likewise would preclude federal agents from seizing individuals who have committed other serious crimes here only to flee abroad. See, *e.g.*, *Kasi* v. *Angelone*, 300 F.3d 487 (4th Cir.), cert. denied, 537 U.S. 1025 (2002) (FBI arrest of fugitive in

Pakistan who killed two CIA agents in Langley, Virginia, when seeking to assassinate the Director of the CIA).[5] If criminals could thus "escape seizure by departing from or avoiding" the territory of the United States, this Nation's criminal laws (including those that apply to conduct committed wholly abroad) "would be of little practical effect * * * , and it is most improbable that Congress intended to leave the avenues of escape thus unguarded." *Maul*, 274 U.S. at 511. Certainly such limits on Executive enforcement authority are not "to be lightly assumed," *id.* at 525 (Brandeis, J., concurring), particularly in view of the Executive Branch's constitutional obligation to "take Care that the Laws be faithfully executed" and its primacy in matters of international relations.

The error in the Ninth Circuit's interpretive methodology is particularly apparent in the context of *investigative* authority. Just as Congress has granted the DEA and the FBI arrest authority without specifying geographic limits, it has granted those agencies parallel criminal investigatory authority as directed by the Attorney General without specifying geographic limits. See 21 U.S.C. 878(a)(5) (DEA agents may "perform such other law enforcement duties as the Attorney General may designate"); 28 U.S.C. 533(1), (3) (Attorney General may appoint agents to "detect and prosecute crimes against the United States" and "to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State"). Despite the absence of express authority to investi-

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[5] Mir Aimal Kasi opened fire with an AK-47 on a line of cars waiting to enter CIA headquarters in Langley, Virginia; he killed two agents and wounded three others. Kasi then fled and successfully avoided capture by hiding in Afghanistan. After he was indicted in the United States in 1993, FBI agents located and seized Kasi while he was making a brief stop in Pakistan and transported him to the United States, where he was tried and convicted. Under the Ninth Circuit's decision, however, that arrest may well have been unlawful, whether or not Pakistan consented, protested, or cooperated actively or tacitly in the capture.

gate such crimes abroad, no one has ever sensibly thought that Congress meant to foreclose federal investigations in foreign countries.

To the contrary, federal agents are regularly called upon to conduct investigations abroad, since many federal crimes are planned or committed (and felons may seek refuge) outside this country. See, *e.g.*, FBI, *Byte Out of History: Solving a Complex Case of International Terrorism* (last modified Dec. 19, 2003) <http://www.fbi.gov/page2/dec03/panam121903.htm> (discussing FBI investigative work in Scotland to prosecute suspects in the bombing of Pan Am Flight 103); FBI, *Partnering Against Global Threats: FBI Director Discusses Common Issues in Mideast and Europe* (last modified Nov. 10, 2003) <http://www.fbi.gov/page2/nov03/rsm111003.htm> (discussing FBI Director Mueller's meeting with FBI agents stationed in Iraq for "investigative purposes"); see also *Authority of the Federal Bureau of Investigation to Override International Law in Extra-territorial Law Enforcement Activities*, 13 Op. Off. Legal Counsel 163 (1989), available in 1989 WL 595835. The FBI, moreover, has long played a role in international intelligence gathering as well as espionage investigations. See, *e.g.*, Exec. Order 12,333, 46 Fed. Reg. 59,941 (1981); Intelligence Authorization Act, Fiscal Year 1990, Pub. L. No. 101-193, § 603, 103 Stat. 1710 (directing that the FBI, subject to the Attorney General's authority, "shall supervise the conduct of all investigations of violations of" U.S. "espionage laws * * * by persons employed by or assigned to United States diplomatic missions abroad"). The DEA currently has approximately 400 agents stationed overseas and 80 offices in 58 different countries. See <http//www.usdoj.gov/dea/agency/domestic.htm> (last visited Jan. 23, 2004). And Congress has long been aware of those international law enforcement activities. See pp. 21-22, 25-26, *supra* (extra-territorial activities of DEA and predecessor departments). The Ninth Circuit's decision to infer a prohibition on extra-territorial law enforcement activity from perceived statu-

tory silence is thus inconsistent with logic and experience alike.

2. *Applying The Presumption Against Extraterritoriality Undermines Its Purposes And Inverts The Constitution's Allocation Of Responsibilities Among The Branches*

The presumption against extraterritorial application of United States law is founded on the "commonsense notion that Congress generally legislates with domestic concerns in mind," *Smith* v. *United States*, 507 U.S. 197, 204 n.5 (1993), and the need to avoid "unintended clashes between our laws and those of other nations," *Aramco*, 499 U.S. at 248. The presumption thus ensures that courts do not misconstrue federal statutes to regulate private primary conduct outside this country where that conduct is principally a concern for a foreign power. It ensures, moreover, that courts do not inappropriately interpose themselves and private lawsuits into sensitive international matters which are the province of the political branches and for which the judiciary has little competence. See *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial," as they involve "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."). See generally U.S. Br. in No. 03-339, *Sosa* v. *Alvarez Machain*, at 31-46; p. 38 & note 7, *infra*.

In *Aramco*, for example, the Court applied the presumption to hold that Title VII's anti-discrimination rules, and the associated private cause of action created thereby, do not apply abroad. Noting that Title VII did not distinguish between United States companies and foreign companies employing United States citizens abroad, the Court found itself unwilling, absent "clearer evidence of congressional intent," to infer that Congress had established "a policy which

would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce." 499 U.S. at 255. Similarly, in *Foley Brothers* v. *Filardo*, 336 U.S. 281, the Court declined to give extraterritorial effect to a federal law requiring employers to pay overtime for work in excess of an eight-hour day. Because the statute and the associated cause of action were motivated by "concern with domestic labor conditions," the Court saw no reason to apply them to Iranian and Iraqi workers in their home countries where the labor conditions "were known to be wholly dissimilar to those in the United States and wholly beyond the control of this nation." 336 U.S. at 286. "An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose." *Ibid.*

Those same considerations weigh *against* applying the presumption here. First, in creating the DEA, Congress sought to establish an agency to fulfill the Executive's enforcement duties with respect to federal laws that expressly apply abroad and to criminals found within this country and without. Indeed, in creating the DEA from the BNDD and other agencies, the Executive and Congress recognized the unique challenges to federal law enforcement in dealing with narcotics. Chief among the distinguishing characteristics is that many illegal narcotics have their sole or primary source abroad, and that an effective drug enforcement policy therefore must attack both domestic demand and foreign supply. See pp. 21-22, 25-26, *supra*. And when Congress restricted the DEA's international arrest authority, it did so expressly and only in limited circumstances. See pp. 23-24, 26 & note 4, *supra*. Consequently, the supposition that Congress must have legislated solely with domestic circumstances in mind has no application here. Cf. *Bowman*, 260 U.S. at 98; *Maul*, 274 U.S. at 510-511.

Nor does the interest of avoiding unintended conflict with foreign powers justify a narrow construction of Section 878.

That interest looms large with respect to statutes that directly regulate private primary conduct without benefit of the Executive's exercise of enforcement discretion, or that create private causes of action that might interpose the judiciary into sensitive foreign relations matters. But it has no application to grants of enforcement authority to the Executive Branch, the Branch the Constitution charges with conducting the Nation's foreign affairs. Indeed, it is precisely because the Executive Branch has both expertise in and constitutional responsibility for the conduct of foreign relations that Congress is presumed to rely on that Branch's sound discretion to carry out its functions with such considerations in mind. *Egan*, 484 U.S. at 529-530 (reiterating "the generally accepted view that foreign policy [is] the province and responsibility of the Executive") (quoting *Haig*, 453 U.S. at 293-294). Congress should not be presumed to wish to hinder the Executive Branch's ability to make case-specific judgments about the tools or proper degree of formal or informal foreign cooperation that is appropriate in apprehending a criminal suspect. Instead, the more sensible view is that Congress both granted the Executive broad authority to determine where and when to enforce federal law, and relied on that Branch to ensure the authority is exercised after taking into account foreign policy and international practices.

Far from reducing the likelihood of conflict with foreign powers, the Ninth Circuit's effort to restrict the Executive Branch's authority in such matters increases the potential for strife. While the Ninth Circuit would bar the DEA from engaging in law enforcement activities such as seizing criminal suspects abroad, it did not dispute the government's ability to use the Nation's *armed forces* to do the same. Pet. App. 4a; *id.* at 80a-81a n.1 (O'Scannlain, J., dissenting); *id.* at 118a (Gould, J., dissenting). The Ninth Circuit nowhere explained why the interest in preventing international conflict would favor the use of military force rather than ordinary law enforcement officers to effect such arrests. Nor could it.

By eliminating one option otherwise available to the Executive Branch, namely the use of law enforcement agencies in their law enforcement capacity, the Ninth Circuit favored the use of another mechanism—the military—that is less likely to be acceptable to foreign countries and more likely to create international strife.[6]

The Ninth Circuit's reliance on the general presumption that Congress does not intend to violate international law, Pet. App. 46a-47a (citing *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)), or invade the sovereignty of foreign nations, *id.* at 38a-39a, is misplaced for the same reasons. Most extraterritorial arrests are conducted with the foreign nation's consent and thus violate neither international law nor national sovereignty. Yet the Ninth Circuit construed Section 878 to deny the power to conduct a transborder arrest even with such consent. Pet. App. 35a n.24. The presumption against extraterritoriality, moreover, has no application to statutes like Section 878 that do no more than grant the Executive Branch discretionary enforcement authority (rather than regulating private primary conduct directly). The presumption with respect to such statutes is that they preserve the Executive's traditional discretion in matters of law enforcement and foreign policy, leaving it to that Branch—in the exercise of its foreign relations authority—to take into consideration foreign

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[6] The Ninth Circuit's decision also threatens to embroil courts adjudicating false arrest claims like this one in difficult distinctions among military, national security, and law enforcement activities, or require them to determine to which agency a particular arrest must be charged, matters for which the judiciary is ill-suited. For example, the Ninth Circuit did not dispute that the Executive Branch has inherent authority to employ domestic law enforcement agents for national security functions abroad. But it offered no judicially manageable standards for determining when a federal agent is serving a "national security" function or an ordinary law enforcement interest. See Pet. App. 81a n.1 (O'Scannlain, J., dissenting); *id.* at 117a n.5 (Gould, J., dissenting). There is thus reason for concern that "the line the majority trie[d] to draw in limiting its decision is more illusory than real." *Id.* at 117a n.5 (Gould, J., dissenting).

policy and international law concerns. See *United States* v. *Corey*, 232 F.3d 1166, 1179 n.9 (9th Cir. 2000).

The Ninth Circuit's decision, moreover, undermines the ability of the Executive to avoid conflict through informal negotiated arrangements with foreign nations. In some circumstances, foreign governments may wish to cooperate with the United States—and rid themselves of criminals within their borders in the process—but be unwilling or unable to effect the arrests themselves. They may also wish to avoid acknowledging their cooperation publicly. The Ninth Circuit's decision hampers the United States' ability to accommodate those concerns by quietly negotiating for the use of U.S. law enforcement agents rather than a military incursion to effect such arrests. It is hard to imagine that Congress intended thus to hamstring the Executive Branch in its exercise of law enforcement and foreign relations powers.[7]

Of course, extraterritorial enforcement efforts undertaken without overt consent from foreign governments are extremely uncommon. The norm is to seek and obtain extradi-

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[7] The panel's vacated September 11, 2001, ruling read the arrest authority to extend abroad, but to require the consent of the foreign country where the arrest takes place. Pet. App. 144a. The en banc majority's opinion, however, held as a matter of statutory construction that federal officials entirely lack extraterritorial arrest power, and adopted a rule that the grant of such arrest power must be expressed by Congress. Pet. App. 35a n.24. But even the textually implausible view of the now-vacated panel opinion—that the statute grants the DEA authority to conduct arrests abroad conditioned on foreign consent—places courts in the middle of potentially sensitive matters of foreign relations. Whether a foreign nation consented, protested, or cooperated actively or tacitly in the capture of criminals is not a proper matter for judicial inquiry. See Pet. App. 99a-101a (O'Scannlain, J., dissenting). If another country has objections to the law enforcement efforts of the United States abroad, that is a matter for diplomatic resolution. See p. 39, & note 8, *infra*. The courts, moreover, are also ill-equipped to determine in any particular case the often politically charged question whether the arrest is permitted by international law, such as whether a U.N. Security Council Resolution authorizes it or whether it is justified as self-defense.

tion or other cooperation from the foreign nation. Because extraterritorial arrests risk violating the territorial sovereignty of a foreign power, they may become the subject of international protest that must be handled as a matter of State-to-State relations. See *United States* v. *Alvarez-Machain*, 504 U.S. 655, 669 (1992).[8] As this case demonstrates, there is sometimes a significant diplomatic price to be paid for exercising extraterritorial law enforcement power. See Pet. App. 25a n.14 (discussing diplomatic consequences). Nonetheless, sometimes foreign governments give consent only confidentially; sometimes the foreign state may have no functioning government with which the United States can negotiate; and sometimes the United States will not have an extradition treaty, or exceptions to the Treaty it does have will apply. Consequently, "[t]he decision to exercise the option of transborder arrest as a tool of national security and federal law enforcement is for the political branches" rather than the courts to make. Pet. App. 108a (O'Scannlain, J., dissenting); see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (restriction on searches abroad "must be imposed by the political branches though diplomatic understanding, treaty, or legislation"); *Alvarez-Machain*, 504 U.S. at 669 & n.16 (even if Alvarez-Machain's apprehension had been "in violation of general international law principles," there is a sizable "advantage [to] the diplomatic approach to the resolution of difficulties between two sovereign nations, as opposed to unilateral action by the courts of one nation").

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[8] There are a variety of negotiated State-to-State remedies for a State-sponsored transborder arrest when such a remedy is deemed necessary and appropriate. See Restatement (Third) of Foreign Relations Law, § 432 & cmt. c (1986); see also S.C. Res. 138, U.N. SCOR, 15th Year, Resolutions and Decisions of the Security Council 1960, at 4 (1965) (U.N. Doc. S/4349). It would hardly serve concerns for minimizing diplomatic tensions to allow individuals to bring an FTCA action and air the same issues that the State-to-State diplomatic remedies were designed to resolve.

As this Court has explained, "[s]ome who violate our laws may live outside our borders in a regime quite different from that which obtains in this country." *Verdugo-Urquidez*, 494 U.S. at 275. The Executive Branch must have the ability to respond to "[s]ituations threatening to important American interests that may arise half-way around the globe." *Ibid.* It must have the flexibility to respond with the tools that best balance foreign policy and law enforcement objectives. A proper reading of Section 878 accords the Executive Branch those tools. The Ninth Circuit's armed-forces-or-nothing approach does not.[9]

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[9] The concurring judges suggested that respondent's extraterritorial arrest was unlawful because it was not authorized by the President or the Attorney General. See Pet. App. 73a-80a (Fischer, J., concurring). The majority, however, held that the DEA lacks statutory authority to arrest outside the United States without regard to such high-level authorization. Section 878, moreover, nowhere conditions the exercise of the broad arrest authority it grants on personal authorization by the President, the Attorney General, or some other official "above the paygrade of those who approved" of respondent's arrest here, see Pet. App. 74a, and the concurrence's attempt to engraft that condition onto Section 878 is textually implausible. Congress knows how to require the personal authorization of a high ranking official, and can do so with great specificity. See, *e.g.*, Foreign Intelligence Surveillance Act, 50 U.S.C. 1802(a); Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Wiretap Act), 18 U.S.C. 2516(1); *United States* v. *Giordano*, 416 U.S. 505, 508 (1974). Absent such specific direction, courts are ill-positioned to decide whether the officials authorizing an action like respondent's arrest—such as the Deputy Director of the DEA, the number two person in the DEA and a presidential appointee—are of insufficient "paygrade." Of course, the Executive Branch has established procedures and policies to ensure that extraterritorial arrests that would violate international law are conducted only with the approval of officials of appropriate rank and responsibility. But those policies and procedures exist as a matter of internal, Executive Branch governance. Their breach would be a serious matter, and cause for the Executive Branch to discipline an offending employee. They do not, however, establish a judicially enforceable private right to freedom from extraterritorial arrest absent use of the specified procedures.

C. The Ninth Circuit's Decision Improperly Denies Federal Officers Authority To Effect Citizen's Arrests

After stripping federal officers of their statutory authority to make arrests for "any felony" based on a territorial limit not found in statutory text, the Ninth Circuit then compounded its error by stripping federal officers of the authority to make citizen's arrests when acting outside their jurisdiction. Pet. App. 70a-72a. The court of appeals did not dispute the nearly universal principle that law enforcement officers are treated "like private citizens" when they "make arrests outside their jurisdiction." Pet. App. 184a-185a (citing *People* v. *Monson*, 105 Cal. Rptr. 92, 95 (Ct. App. 1972); *People* v. *Califano*, 85 Cal. Rptr. 292, 298 (Ct. App. 1970)); see *id.* at 70a & n.44.[10] For that reason, the district court held that the arrest of respondent on probable cause, even if exercised without federal statutory authority, was a permissible citizen's arrest. See Pet. App. 183a-191a; see Pet. App. 187a ("[I]f a peace officer, or any individual, from another state entered California with the requisite probable cause to arrest an individual, then California would presumably not consider that action a false arrest."). Because the government is only liable under the FTCA "as a private individual under like circumstances," 28 U.S.C. 1346(b)(1), see 28

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[10] See *People* v. *Marino*, 400 N.E.2d 491, 496-497 (Ill. App. Ct. 1980) (collecting cases); *Commonwealth* v. *Harris*, 415 N.E.2d 216, 220 (Mass. App. Ct.) (collecting cases), review denied, 441 N.E.2d 1042 (Mass. 1981); see also *United States* v. *Sealed Juvenile 1*, 255 F.3d 213, 217-218 (5th Cir. 2001) (explaining that a wide range of law enforcement officers have power to effect citizens' arrests and noting that the contrary result would be "counter-intuitive" and lead to "absurd results"); *United States* v. *Layne*, 6 F.3d 396, 398-399 (6th Cir. 1993), cert. denied, 511 U.S. 1006 (1994) (finding an arrest by a law enforcement officer valid under Tennessee's citizen's arrest statute); *Ward* v. *United States*, 316 F.2d 113, 117 (9th Cir.) (similar result for postal inspector under California law), cert. denied, 375 U.S. 862 (1963).

U.S.C. 2674, the government cannot be held liable for false arrest where private persons would not.

Departing from that approach, the Ninth Circuit majority created a special federal rule that denies federal law enforcement officers, and only federal law enforcement officers, the authority to make citizen's arrests. Invoking its earlier decision in *Arnsberg* v. *United States*, 757 F.2d 971 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986), the court of appeals held that the "the law of citizen arrest cannot * * * be used to extend" arrest authority "beyond its territorial limits." Pet. App. 71a. The Ninth Circuit thus held that, even though an ordinary citizen acting without special law enforcement authority in the jurisdiction would not violate California law by arresting respondent on probable cause, even outside the citizen's home State, see *id.* at 70a n.44, 187a, federal officers acting in locations where they similarly have no special statutory arrest authority are deemed to commit a tort for effecting the identical arrest, *id.* at 71a-72a.

That result has no basis in law. There is no principled reason for denying federal law enforcement officers acting outside their statutory jurisdiction the ability to make citizen's arrests simply because they are federal officers. The contrary rule openly discriminates against federal officers because they are federal officers. And it conflicts with the express statutory directive that the United States is liable only to the extent a private person would be liable under like circumstances. See 28 U.S.C. 1346(b)(1), 2674. A private person who has no special law enforcement powers may effect a citizen's arrests on probable cause. The same rule must apply to federal officers who allegedly lack special law enforcement powers because they are operating outside their jurisdictional authority.

II. The FTCA Exception For Claims Arising In A Foreign Country Bars Respondent's Lawsuit

While denying a federal law enforcement agency the authority to enforce federal law abroad based on statutory silence, the Ninth Circuit accorded itself authority under the FTCA to pass on the propriety of foreign arrests notwithstanding that statute's express exception for "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k). Because the "foreign country" exclusion is a limit on "the scope of the United States' waiver of sovereign immunity," it must be construed strictly in favor of the United States. See *Smith* v. *United States*, 507 U.S. 197, 201, 203-204 (1993); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (waivers of sovereign immunity must be "construed strictly in favor of the sovereign"). That exception bars respondent's false arrest claim here.

A. The So-Called "Headquarters Doctrine" Does Not Excuse Courts From Applying The FTCA's Express Exception For Claims Arising In Foreign Countries

The Ninth Circuit did not dispute that respondent's arrest took place in a foreign country. In fact, the *only* reason that court found the arrest of respondent—an indicted suspect—on probable cause to be "false" and thus tortious was that it took place in Mexico. See Pet. App. 70a (holding the arrest to be false because the "DEA agents had no authority under federal law to execute an extraterritorial arrest of a suspect indicted in federal court"). The court, moreover, agreed that liability was only appropriate for the actions that took place abroad—that damages were available only for the brief interval beginning with respondent's seizure in Mexico and ending with respondent's delivery into the United States. *Id.* at 60a-64a. Accordingly, the claim in this case unquestionably arose in a foreign country, and Section 2680(k) denies federal courts authority to entertain it.

To avoid that result, the Ninth Circuit invoked the so-called "headquarters doctrine" developed by several courts

of appeals (see Pet. 27 n.11) based on this Court's decision in *Richards* v. *United States*, 369 U.S. 1 (1962). *Richards*, however, did not construe the scope of the foreign country exception or the meaning of the phrase "arising in a foreign country." Nor did it purport to create a free-standing, extra-statutory "headquarters doctrine." Instead, *Richards* addressed "where the act or omission occurred," 28 U.S.C. 1346(b), for purposes of determining which State's tort law to apply. In *Richards* itself, the negligence (the substandard repair of an airplane) took place in Oklahoma but the injury (the resulting crash) occurred in Missouri. See 369 U.S. at 2-3. The Court held that the relevant "act or omission occurred" in the State where the negligence "took place," even if the injury was sustained in another State. *Id.* at 8, 10. *Richards* had no reason to address Section 2680(k) and it certainly does nothing to support the extraordinary proposition that Section 2680(k)'s exception for claims "arising in a foreign country" is inapplicable where the allegedly tortious conduct occurs abroad, where damages accrue only while that conduct continues abroad, and where the only reason the conduct is tortious is that it occurred abroad. The Ninth Circuit's contrary holding effectively excises the foreign country exception from the FTCA.

Richards and its focus on where the tortious activity occurred, moreover, provide no support for the Ninth Circuit's attempt to make a tort committed abroad actionable under a "headquarters exception" whenever there is involvement by officials inside the United States. Torts may often involve planning, authorization, or support from officials in multiple jurisdictions. But the tortious conduct itself—the particular conduct that makes the matter actionable—generally will occur exclusively or predominantly in one place. *Richards* involved a search for the jurisdiction where the critical act of negligence was committed. The Ninth Circuit's variant of the headquarters doctrine renders the FTCA's foreign country exception inapplicable whenever some authorization, support, or

planning took place in the United States. As explained herein, it thus does not represent an effort to determine where the claim arose, but is an expedient to avoid the foreign country exception whenever some involvement of officials in the United States is shown.

More fundamentally, the Ninth Circuit's approach departs from Section's 2680(k)'s text, which asks where the claim arose, not where it was planned or authorized. Tort claims simply do not "arise" in every location where steps toward commission were undertaken. Instead, the claims generally arise where the tort is completed—*e.g.*, where the conduct that fell below the relevant standard of care or duty took place. In intentional tort cases like this one, the tort generally "occurs" where the prohibited act is committed. See Restatement (Second) Conflict of Laws § 145 cmts. c, f, e (1971). For example, had the arrest at issue here been planned in California and executed in Arizona, there could be no doubt that the FTCA would look to Arizona as the place where the "wrongful act" occurred. See *Landry* v. *A-Able Bonding, Inc.*, 75 F.3d 200, 205 n.7 (5th Cir. 1996) (applying Texas law to claim of false imprisonment that took place in Texas pursuant to an arrest warrant issued in Louisiana). In this case, respondent's false arrest claim arose in Mexico. The arrest is alleged to be "false" and thus actionable only because it took place in Mexico. A critical element of the claim—the "nonconsensual, intentional confinement of a person," *Scofield* v. *Critical Air Med. Inc.*, 52 Cal. Rptr. 2d 915, 920 (Ct. App. 1996)—occurred in Mexico, and ceased to be actionable once respondent crossed the border into the United States. And none of the elements of the tort of false arrest occurred in the United States. Mexico thus was not merely the site of the injury. It was the location where the allegedly wrongful "act * * * occurred" and the place where the claim "arose" within the meaning of the FTCA. The invocation of a judicially crafted "headquarters doctrine" does not alter that reality.

B. The Ninth Circuit's Application Of The Headquarters Doctrine Contravenes The Purposes Of The Foreign Country Exception

The "headquarters" theory relied upon by the Ninth Circuit is also at odds with the purposes of the foreign country exception in the FTCA. This Court has explained that the foreign country exception must be viewed together with 28 U.S.C. 1346, which "waives the sovereign immunity of the United States for certain torts committed by federal employees 'under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.*'" *Smith*, 507 U.S. at 201 (quoting 28 U.S.C. 1346(b)). "By the exclusion of claims 'arising in any foreign country,' the coverage of the Federal Tort Claims Act was geared to the sovereignty of the United States." *United States* v. *Spelar*, 338 U.S. 217, 219 (1949). The foreign country exception was enacted because Congress was "unwilling to subject the United States to liabilities depending upon the laws of a foreign power." *Id.* at 220-221. The exception, moreover, helps prevent unnecessary judicial entanglement in sensitive matters of foreign relations.

Recognizing that applying Mexican law to determine the legality of respondent's arrest would be inconsistent with *Spelar*, the court of appeals and district court went through legal gymnastics to apply California rather than Mexican law. See Pet. App. 190a (noting the "artificial" nature of the resulting inquiry). That is just another example of how the headquarters doctrine has become an artifice to circumvent the FTCA's foreign country exception rather than a device for determining where the claim "arose" for jurisdictional purposes. It is hard to see how it makes any sense to apply California law to determine whether the United States is liable for the arrest of a Mexican citizen, by other Mexican nationals, inside Mexico. In general, foreign tort law is applicable where the intentional act occurred abroad. See *Curley* v. *AMR Corp.*, 153 F.3d 5, 12-15 (2d Cir. 1998)

(applying New York choice-of-law rules); *Hamilton* v. *Accu-Tek*, 47 F. Supp. 2d 330, 340 (E.D.N.Y. 1999); *Xuncax* v. *Gramajo*, 886 F. Supp. 162, 195-196 (D. Mass. 1995); *Roxas* v. *Marcos*, 969 P.2d 1209, 1235 n.16 (Hawaii 1998). As noted above, if the arrest took place in Arizona rather than Mexico, it would be clear that Arizona rather than California law applies. The statutory choice-of-law precepts do not change merely because their proper application demonstrates that the lawsuit is statutorily precluded.[11]

Nor does purporting to apply California legal standards sidestep the imposition of liability based on foreign law. If Sosa and the arrest team had been Mexican law enforcement officers authorized by Mexican law to effect respondent's arrest and hand him over to United States authorities, their conduct would not have been tortious. Instead, it would have been lawful by virtue of their status under Mexican law. See Pet. App. 34a n.23 (noting that other suspects were seized by foreign agents with local authority). The Ninth Circuit thus did not deem the arrest in this case to be "false" because it violated some California or constitutional standard for arrests, such as the requirement of probable cause. It deemed the arrest to be false because it was effected without legal authority, whether Californian, United States, or Mexican. See Pet. App. 70a; see *id.* at 33a-50a (arrest unauthorized by law). Because Mexican law could provide that authority just as clearly as any other source (even through the law of citizen's arrest), this is precisely the sort of case Congress sought to exclude under 28 U.S.C. 2680(k)—one in which liability depends on "the laws of a foreign power" and the legal status of the arresting individuals under those laws.

Finally, the court of appeals' expansive application of the "headquarters doctrine" (and of its jurisdiction under the 28

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[11] Nor can international law provide the substantive tort law required by Section 1346(b). See *Goldstar (Panama) S.A.* v. *United States*, 967 F.2d 965, 970 (4th Cir. 1992); cf. *FDIC* v. *Meyer*, 510 U.S. 471, 478 (1994).

U.S.C. 1350 at issue in *Sosa* v. *Alvarez-Machain*, No. 03-339), places that court squarely where federal courts do not belong—in the realm of international politics, adjudicating the propriety of Executive conduct abroad. In this case, for example, the Ninth Circuit is attempting to address in a judicial forum issues of national sovereignty that the political branches of the United States and Mexico addressed by diplomacy long ago. The decision, moreover, drags the federal judiciary into review of foreign policy issues for which "the Judiciary has neither aptitude, facilities nor responsibility and which ha[ve] long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & S. Air Lines*, 333 U.S. at 111.

C. The Ninth Circuit's Decision Inverts The Constitution's Allocation Of Powers Among The Branches And Threatens To Embroil Courts In Foreign Relations Matters

The Ninth Circuit's willingness to arrogate for itself the constitutional role of the Executive Branch, far from being an isolated mistake, pervades its decision. When determining the *judiciary's* authority under the waiver of sovereign immunity in the FTCA, the Ninth Circuit construed the FTCA broadly to permit adjudication of the validity of an extraterritorial arrest, notwithstanding an express exception in 28 U.S.C. 2680(k) for claims arising abroad, and notwithstanding the rule that waivers of sovereign immunity are narrowly construed in favor of the sovereign. When determining whether the *judiciary* should impose liability under the FTCA for that foreign arrest, the Ninth Circuit applied state law broadly, holding an arrest in Mexico to be tortious through an extraterritorial application of the law of the State of California. And when deciding the scope of the *judiciary's* authority to recognize new causes of action under 28 U.S.C. 1350 at issue in *Sosa* v. *Alvarez-Machain*, No. 03-339, the Ninth Circuit gave that statute a broad construction too, holding that it permits courts to adjudicate, under

international law, disputes between foreign nationals arising out of events that took place abroad. See U.S. Br. As Respondent Supporting Petitioner at 48-49, No. 03-339 (arguing that Section 1350 merely provides jurisdiction and should not apply to disputes arising abroad).

But when passing on the scope of *Executive Branch* authority to conduct arrests abroad under a statute that contains no express geographic limit, the Ninth Circuit invoked the presumption against extraterritorial application to deny the Executive Branch that authority—even though the laws the Executive is charged with enforcing by their terms apply to conduct taking place abroad, and even though other federal statutes expressly contemplate extraterritorial arrests. Moreover, when passing on the authority of *Executive Branch* officers to make citizen's arrests outside their territorial jurisdiction, the Ninth Circuit denied them such authority because they are federal officers.

The Ninth Circuit's highly selective application of the presumption against extraterritoriality is exactly backwards. In matters touching on foreign relations and law enforcement—whether, where, when, and how to enforce federal law—Executive authority is at its apogee and judicial expertise at its nadir. See *Chicago & S. Air Lines*, 333 U.S. at 111; *Egan*, 484 U.S. at 529-530 ("[F]oreign policy [is] the province and responsibility of the Executive") (quoting *Haig*, 453 U.S. at 293-294); *Haig*, 453 U.S. at 292 ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."). It is precisely to avoid judicial or private actions that would trench on the Executive's authority to conduct foreign relations that Acts of Congress are presumed not to have extraterritorial effect. See pp. 34-40, *supra*. No less than the Constitution, federal statutes that on their face *grant* the Executive Branch authority should not be construed to disrupt the ability of that Branch "to respond to foreign situations involving our national interest," *Verdugo-Urquidez*, 494 U.S. at 274, or to "take Care that the Laws be

faithfully executed," U.S. Const. Art. II, § 3, Cl. 4. Because the Ninth Circuit's decision ignores those principles and inverts the traditional allocation of responsibilities among the Branches—arrogating to the judiciary the authority to pass upon the propriety of Executive conduct abroad while denying the Executive its traditional authority in matters of law enforcement and foreign relations—its judgment cannot stand.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Section 878 of Title 21 of the U.S. Code provides, in relevant part, as follows:

§ 878. Powers of enforcement personnel

(a) Any officer or employee of the Drug Enforcement Administration or any State or local law enforcement officer designated by the Attorney General may—

(1) carry firearms;

(2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of the United States;

(3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;

(4) make seizures of property pursuant to the provisions of this subchapter; and

(5) perform such other law enforcement duties as the Attorney General may designate * * *.

2. Section 3052 of Title 18 of the U.S. Code provides as follows:

§ 3052. Powers of Federal Bureau of Investigation

The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United

States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

3. The Mansfield Amendment, Pub. L. No. 94-329, § 504(b), 90 Stat. 764 (1976), codified as 22 U.S.C. 2291(c), provides in relevant part:

§ 2291. Policy, general authorities, coordination, foreign police actions, definitions, and other provisions

* * * * *

(c) Participation in foreign police actions

(1) Prohibition on effecting an arrest

No officer or employee of the United States may directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts, notwithstanding any other provision of law.

(2) Participation in arrest actions

Paragraph (1) does not prohibit an officer or employee of the United States, with the approval of the United States chief of mission, from being present when foreign officers are effecting an arrest or from assisting foreign officers who are effecting an arrest.

(3) Exception for exigent, threatening circumstances

Paragraph (1) does not prohibit an officer or employee from taking direct action to protect life or safety if exigent circumstances arise which are unanticipated and which pose an immediate threat to United States officers or employees, officers or employees of a foreign government, or members of the public.

(4) Exception for maritime law enforcement

With the agreement of a foreign country, paragraph (1) does not apply with respect to maritime law enforcement operations in the territorial sea or archipelagic waters of that country.

(5) Interrogations

No officer or employee of the United States may interrogate or be present during the interrogation of any United States person arrested in any foreign country with respect to narcotics control efforts without the written consent of such person.

(6) Exception for status of forces arrangements

This subsection does not apply to the activities of the United States Armed Forces in carrying out their responsibilities under applicable Status of Forces arrangements.

4. The Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, provides in relevant part:

§ 1346. United States as defendant.

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

* * * * *

§ 2674. Liability of the United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of

occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

* * * * *

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the

possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection,

"investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

Supreme Court, U.S.
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No. 03-485

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

vs.

HUMBERTO ALVAREZ-MACHAIN, et al.,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the federal law enforcement officers, and agents of the Drug Enforcement Administration in particular, have authority to enforce a federal criminal statute that applies to acts perpetrated against a United States official in a foreign country by arresting an indicted criminal suspect on probable cause in a foreign country.

2. Whether an individual arrested in a foreign country may bring an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, for false arrest, notwithstanding the FTCA's exclusion of "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k), because the arrest was planned in the United States.

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Treaties, Statutes and Regulations

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21 U.S.T. 607, T.I.A.S. No. 6847,
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United Nations Charter, June 26, 1945,
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1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna December 20, 1988
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P.C.I.J. (Ser A) No. 10 19
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121 Cong.Rec. 38994 (Dec. 8, 1975) 12
122 Cong. Rec. 2592 (1976) 12
134 Cong.Rec.S. 16,036 (1988) 11
Extraterritorial Abduction by the Federal
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Hearing Before the Subcomm. Civil &
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Comm., 101st Cong. 1st Sess. (1989) 23
Louis Henkin, *A Decent Respect to the*
Opinions of Mankind,
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Lowenfeld, *Kidnapping by Government*
Order: A Follow-up,
84 Am.J. Int'l 712 (1990) 6

Mansfield Amendment Sen. Report I 12-13
L. Oppenheim, International Law
§144b (H. Lauterpacht, 8th ed. 1995) 20
Preuss, *Settlement of Jacob Kidnaping Case,*
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Report by Senator Mansfield, "Winds of Change:
Evolving Relations and Interests in
Southeast Asia," S.Rep.No. 382-38,
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on S. 2662, S. Rep. No. 605, 94th
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The Barr Opinion,
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OPINIONS BELOW

The opinion of the decision of the Court of Appeals sitting *en banc* (Pet. App. 1a-121a) is reported at 331 F. 3d 604. The panel decision of the court of appeals (Pet. App. 122a-156a) is reported at 266 F. 3d 1045. The district court's orders of March 18, 1999 (Pet. App. 157a-207a) and May 18, 1999 (Pet. App. 212a-247a), and its September 9, 1999, judgment (Pet. App. 212a-247a), as amended on September 23, 1999 (Pet. App. 248a-249a) are unreported.

JURISDICTION

This Court has jurisdiction based upon 28 U.S.C. § 1254(1).

STATEMENT

This case concerns the legal accountability of the United States under the Federal Tort Claims Act ("FTCA") for the unauthorized actions of low-level officials of the Drug Enforcement Agency ("DEA"). These officials planned and supervised the abduction of Dr. Humberto Alvarez-Machain from his medical office in Mexico in April 1990, and his surreptitious transportation from Mexico to the United States to stand trial for the murder of a drug enforcement agent in Mexico.

At trial Dr. Alvarez-Machain was acquitted of the underlying crime, and the United States now portrays his effort to obtain compensation for the misconduct of U.S. officials and their paid agents 14 years ago as both a threat to the war on terrorism and an attack on Executive authority. But those issues simply do not arise on these facts since the

abduction in this case was executed without the knowledge of either the President or the Attorney General and this case has nothing to do with acts of terrorism. This case concerns only a $25,000 damages judgment to remedy an unlawful abduction and reaffirm the rule of law.

Humberto Alvarez-Machain is a Mexican citizen and a doctor residing in Guadalajara. On April 2, 1990, he was abducted at gunpoint from his medical office by several Mexican nationals hired by the DEA to transport him to the United States. These men, including Francisco Sosa, the Petitioner in No. 03-339, were private bounty hunters acting in blatant violation of Mexican law. They had no warrant or any other legal authority to arrest or detain Dr. Alvarez at the time of his abduction.[1]

In January 1990, Dr. Alvarez was indicted by a grand jury for his alleged role in the April 1985 torture and murder of DEA agent Enrique Camarena in Mexico. It has never been alleged that Dr. Alvarez was engaged in any activity that posed any past or future threat to the national security of the United States. In 1990, he was being sought only for his alleged participation in this specific crime.

At no time was any formal request for extradition made to the Mexican government under the Mexico-United States extradition treaty.[2] Instead, the DEA agents in charge

---

[1]There was a warrant issued for Respondent's arrest in Los Angeles, but this warrant was limited on its face to the territory of the United States. *See* Fed. R. Crim. P. 4(d)(2) ("*Territorial Limits*. The warrant [of arrest] may be executed or the summons may be served at any place within the jurisdiction of the United States").

[2]The Government claims to have had abortive informal discussions with Mexican officials about Dr. Alvarez; however, no formal request was made. Had the procedures of the United States-

of "Operation Leyenda" (the name of the operation to identify, prosecute and punish those responsible for agent Camarena's death) decided to bring Dr. Alvarez to the United States by extra-legal means. The zeal the DEA officers involved in this operation acted with to redress the murder of a fallen officer is understandable, but it cannot justify the circumvention of the limits on their lawful authority.

The authorization for this operation came from the Deputy Administrator of the DEA. There is no evidence in the record that any more senior government official approved it. Indeed, the DEA Administrator at the time, Jack Lawn, testified that he was unaware of the operation. *Alvarez-Machain,* 331 F. 3d at 642. Neither the President nor the Attorney General authorized this operation. *Id.*

After he was brought to Los Angeles, Dr. Alvarez sought dismissal of his prosecution on the grounds that the United States violated its extradition treaty with Mexico. Ultimately, this contention was rejected by this Court in *United States v. Alvarez-Machain*, 504 U.S. 669 (1992).

On remand, Dr. Alvarez was tried on the charges against him and on December 14, 1992, District Judge Edward Rafeedie granted his motion for acquittal finding that the government's case was based on "hunches" and "wild speculation" rather than legally sufficient evidence that Dr. Alvarez had participated in Agent Camarena's death.[3]

Mexico Extradition Treaty been followed , it seems unlikely that the United States could have presented adequate evidence of Dr. Alvarez' involvement in this crime to obtain his extradition.

[3]Judge Rafeedie was intimately familiar with the facts of the Camarena case, having presided over the convictions of several Camarena defendants. *See, e.g., United States. v. Lopez-Alvarez*, 970 F.2d 583, 586-587 (9th Cir. 1992) (convictions for violent crimes in aid

Dr. Alvarez initiated this lawsuit in July, 1993 after his return to Mexico. The facts concerning Dr. Alvarez' treatment during his abduction were hotly disputed at trial. Nevertheless, it is undisputed that Dr. Alvarez was abducted from his medical office on April 2, 1990, by Sosa and his associates, driven away in a private car while avoiding Mexican authorities, held in a motel overnight in a nearby town, prohibited from contacting his family, and prevented from leaving his captors at any time until they turned him over to waiting DEA agents in El Paso, Texas on April 3, 1990.

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of racketeering, conspiracy to kidnap and kidnapping a federal agent, felony murder and accessory after the fact affirmed); *United States. v. Felix-Gutierrez*, 940 F.2d 1200, 1202 (9th Cir. 1991) (ten year sentence for being an accessory after the fact affirmed); *United States. v. Vasquez-Velasco*, 15 F.3d 833, 838 (9th Cir. 1994) (two consecutive life terms for murders, related to and preceding the Camarena murder, of two tourists suspected of being DEA agents); *United States. v. Bernabe-Ramirez*, 1994 U.S. App. LEXIS 33719 (9th Cir. 1994) (convictions for kidnapping, being an accessory after the fact and committing violent crimes in aid of racketeering activity affirmed); *United States. v. Matta-Ballesteros*, 71 F.3d 754, 761-762 (9th Cir. 1995) (convictions for kidnapping a federal agent and conspiring to kidnap a federal agent affirmed); United States. v. Zuno-Arce, 339 F. 3d 886 (9th Cir. 2003)(conviction affirmed).

SUMMARY OF ARGUMENT

Dr. Alvarez' abduction and transportation to the United States violated U.S., Mexican, and international law.[4] The abduction fell outside the DEA's statutory arrest authority granted by Congress, and violated the Mansfield Amendment's explicit prohibition on DEA participation in extraterritorial arrests. 32 U.S.C. § 2291 (c)

The statutory and international law limitations on the DEA's authority to engage in extraterritorial arrests were clear and well-established at the time of the abduction. There can be no doubt that those officials who played a role in this operation knew that they were engaging in an extra-legal and unauthorized abduction.

The Government's claim that Congress has authorized the DEA to engage in extraterritorial arrests in violation of international law and notwithstanding the Mansfield Amendment is not supported by the language of 21 U.S.C. § 878. The United States implausibly argues that Congress *expressly* granted to the DEA extraterritorial arrest authority although the plain text of Section 878 is silent on where arrests may take place.

Section 878 must be construed in light of the subsequent Mansfield Amendment, which expressly bars U.S.

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[4]The Mexican Government immediately and formally protested the abduction and sought the extradition of the DEA agents involved in the operation. The governments of Mexico and Canada submitted *amicus* briefs to this Court stating that they considered the abduction to be a violation of established international law, *see* 31 I.L.M. 934 (1992)(Mexico) and 31 I.L.M. 919 (1992) (Canada), and the action has been condemned by the international community, just as the U.S. government would condemn the abduction of an American citizen from our territory.

law enforcement from participating in police actions in foreign countries related to narcotics control efforts. Section 878 must also be interpreted consistently with the long-established international norm against non-consensual law enforcement actions within the territory of another state.

The history of DEA activities in foreign countries and Congressional oversight thereof demonstrate that the DEA was only authorized to conduct its activities in cooperation with foreign governments in accordance with international law. Indeed, mutual cooperation between the United States and its allies, including Mexico, is the foundation of the DEA's foreign activities. There is no evidence whatsoever that Congress intended to authorize low- level DEA agents to undermine such cooperative efforts by abducting foreign nationals from their countries.[5]

Finally, these restrictions on the DEA's extraterritorial arrest authority are reinforced by the longstanding presumption against extraterritorial application of statutes, as the Court of Appeals held.

The United States incorrectly argues that federal DEA agents, who meticulously planned and supervised Dr. Alvarez' arrest from within the United States, should not be held accountable because of the FTCA's "foreign activities"

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[5] "At a speech in Los Angeles on April 23, 1990, shortly after this abduction, President Carlos Salinas de Gortari called for stricter respect for international law and an end to 'unilateral actions outside the law and infringing the rights of other nations'." Andreas F. Lowenfeld, *Kidnapping by Government Order: A Follow-up*, 84 Am. J. Int'l 712, 715 n. 10 (1990). "President [George H.W.] Bush, at his news conference on May 3, 1990, said 'yes, there were some misunderstandings here and I've told our key people to eliminate the misunderstandings. We don't need misunderstandings with Mexico...'"

exemption. In making this argument, the United States asks this Court to overturn the "headquarters doctrine" that has been *unanimously* upheld by the lower federal courts. The "headquarters doctrine" is fully consistent with the presumption against the extraterritoriality of statutes and recognizes that some torts may properly be traced to the conduct of federal officers acting within the territory of the United States.

The Government seeks to craft new law on issues not properly before the Court. The issue of whether federal law enforcement officials are authorized to engage in extraterritorial arrests or other activities in connection with the war on terrorism or in response to other national security threats is simply not raised by this case. Instead, the judgment below is supported by well-established jurisprudence providing for Congressional control of federal law enforcement activity and judicial review of those limitations. The actions of these DEA agents, in fact, undermined the Presidential control over foreign affairs and embroiled the United States in a needless dispute with its ally, Mexico. In short, it is the Government's view of Executive authority, not Dr. Alvarez' attempt to obtain compensation for his unlawful abduction, that poses a threat to the separation of powers.

The Court of Appeals' opinion does nothing to undermine the Executive's ability to protect our national security. Nor does the opinion address the question of the President s inherent authority to authorize the seizure of a foreign national suspected of a criminal offense outside the territorial boundaries of the United States for national security reasons. The opinion does not address the authority of other federal law enforcement entities or other agencies. No such directive was made in this case. The opinion defers to Congressional intent and acknowledges that Congress can

authorize the subordinate officers of the DEA to engage in extraterritorial arrests if it wishes to, even if such arrests violate international law, provided that Congressional intent is manifest.

The decision below enables Dr. Alvarez to recover a very modest amount of compensation from the United States for an abduction condemned around the world as a violation of domestic and international law. This result is in keeping with the remedial purposes of the FTCA and constitutes a modest accommodation to the rule of law in the face of claims of unrestrained Executive power. Such adherence to the rule of law will strengthen our national security, not undermine it.

ARGUMENT

I. THE DEA'S AUTHORIZATION STATUTE NEITHER EXPRESSLY NOR IMPLIEDLY AUTHORIZES EXTRATERRITORIAL ARRESTS.

The United States relies on a convoluted statutory construction argument premised on the erroneous assertion that 21 U.S.C. §878 (the DEA authorization statute) expressly authorizes DEA officers to engage in extraterritorial arrests. Section 878 simply does not say this. Moreover, the government's position flies in the face of explicit Congressional restrictions on extraterritorial arrests, and the presumption that federal statutes should not be read to allow violations of international law and the presumption against the extraterritorial effect of federal statutes.

Section 878 provides that:

> [a]ny officer or employee of the Drug Enforcement Administration or any State or local law enforcement officer designated by the Attorney General may. . . (3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony. . .

21 U.S.C. § 878(a). The statute does not explicitly authorize extraterritorial arrests.

In fact, the statute most directly on point, 22 U.S.C. §2291(c)(the Mansfield Amendment), expressly prohibits such extraterritorial arrests. (Prohibiting federal employees from "directly effect[ing] an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts.")

In addition to the Mansfield Amendment's explicit restrictions on extraterritorial arrests, the government's proposed interpretation of Section 878 also flies in the face of the fundamental principle that federal statutes should never be construed to authorize violations of international law if another construction is possible. In this case, the prohibitions on non-consensual extraterritorial arrests in international law are clear and have long been accepted by the United States. This fundamental tenet precludes the government's request that this Court read into Section 878 a blanket authorization to violate international law when any low-level federal officer believes it is necessary.

Finally, it is equally well-settled that when a statute is silent regarding extraterritorial application, that statute will be interpreted to apply only within the territory of the United States, as the *en banc* Court of Appeals held below.

In the final analysis, the Government's arguments are that this Court should re-evaluate the existing limitations on the DEA's authority in light of the events of September 11, 2001. However, this request makes no sense in the specific context of the 1990 abduction that gave rise to this case and should, in any event, be addressed to Congress.

A. Section 878 Does Not Authorize Arrests in the Territory of Foreign Countries Without the Consent of the Territorial State

The history of the DEA's drug enforcement and control activities in other countries is one of cooperation and securing the consent of foreign governments for those activities. The United States does not provide any history of Congressional knowledge and acquiescence in non-consensual DEA activities in foreign countries. The history cited by the United States is of *cooperative* narcotics enforcement in foreign countries. There is no evidence that Section 878 was intended to authorize non-consensual operations in other countries by DEA agents.[6] The Mansfield

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[6]The Government places inordinate reliance on statements by one legislator, Senator Specter, to support its view of the statute. *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980) (Statements of a single legislator who sponsored a bill are not controlling in analyzing legislative history). If Senator Specter's comments should be considered at all, this Court should note that Senator Specter believed that DEA agents' power to engage in law enforcement overseas *was* subject to the consent of the host country.

Amendment, the presumption against construing statutes to authorize international law violations and the presumption against extraterritorial application of statutes all confirm that Section 878 does not authorize the DEA to conduct extraterritorial seizures without the consent of the host country.

B. The Mansfield Amendment Expressly Prohibited Dr. Alvarez' Seizure.

Far from confirming the power of DEA officers to engage in extraterritorial arrests at its discretion, as the United States contends, the Mansfield Amendment circumscribes extraterritorial law enforcement activities, especially of the DEA, in this area. The Mansfield Amendment confirms that Congress has not granted the DEA the authority to make arrests in foreign countries without the host country's consent. That Amendment specifically prohibits all law enforcement agencies, including the DEA, from using paid agents to abduct Dr. Alvarez from Mexico to the United States.

Section 2291(c)(1) prohibits officers and employees of the United States from "directly effect[ing] an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts." The plain meaning is indisputable: the DEA did not have the authority to seize Dr. Alvarez in Mexico.

This plain meaning is also strongly reinforced by the Amendment's legislative history. The Senate Foreign Relations Committee Report stated that "[i]t is the Committee's intent that 'police action,' as used in this

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See 134 Cong. Rec. S. 16,036 (Daily Ed. Oct. 12, 1988) (statement of Sen. Specter).

provision is meant to prohibit U.S. narcotics agents abroad from engaging in actions involving the use of force and *actions involving the arrest of foreign nationals – whether unilaterally (acting on their own)* or as members of teams involving agents or officials of other foreign governments." *Internal Security Assistance & Arms Control Act*, S. 2662, 94th Cong., § 55 (2d Sess. 1976) (emphasis added) (hereinafter "*Mansfield Amendment Senate Report*").

Against these definitive statements in the legislative history, the United States offers only the supposition that "foreign police action" does not carry its clear meaning because the Amendment uses the term "foreign" twice. *Pet. Brf.* at 24 n. 3.[7] In contrast, the Justice Department's Office of Legal Counsel opined before the abduction in this case that the Mansfield Amendment applied to those circumstances where the DEA's conduct would likely result in the arrest of foreign nationals. 10 U.S. Op. Off. Legal Counsel 122 (1986). These limitations applied even where DEA officers,

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[7]A number of other statements in the legislative history confirm Congress' clear intent to bar unilateral law enforcement actions by the United States in foreign territory related to narcotics control efforts. *See* Report by Senator Mansfield, Winds of Change: Evolving Relations and Interests in Southeast Asia, S. Rep. No. 382-38, 94th Cong., 1st Sess. 9 at 9-10 (daily ed. Oct. 1975) (Police actions, including local drug enforcement, are functions of indigenous governments. If there is a U.S. role, it should be limited to the exchange of information and intelligence with appropriate Thai or other officials.); 121 CONG. REC. 38994 at 38994-95 (daily ed. Dec. 8, 1975) (Statement of Sen. Mansfield) (We cannot enlist the cooperation of others in the cause of protecting basic human rights and at the same time espouse a doctrine of law and order at any price. And. . . we cannot have it both ways-- and then refuse to accept any responsibility when things go sour.); 122 CONG. REC. 2592 (1976) (statement of Sen. Mansfield) ("[L]aw enforcement actions in foreign countries are -- and should remain -- the responsibility of local governments.").

like agent Camarena himself, were lawfully present in a foreign country.

The United States makes two implausible arguments as to why the Mansfield Amendment is inapplicable to this abduction: (1) the DEA was not "directly effect[ing]" Dr. Alvarez's arrest and (2) it was not part of any "foreign police action." *Pet. Brf.* at 23-24. Both of these arguments are premised on the fact that the DEA officers in this case hired bounty hunters to effectuate the seizure, rather than seize Dr. Alvarez themselves, or seize him with Mexican law enforcement authorities. This reasoning cannot be accepted as a justification for circumventing such clear Congressional intent.

First, the DEA was clearly "directly effecting" Respondent's arrest. The undisputed record evidence is that the DEA initiated and supervised the entire operation. The sole object of the operation was to seize Dr. Alvarez and bring him to the United States. The seizure would not have taken place had the DEA not conceived and executed the plan.

Second, with respect to "police action," Congress clearly intended this term to encompass unilateral actions by the United States as well as United States participation in foreign arrests. *See Mansfield Amendment Senate Report,* at 11-12. Moreover, even under the United States' definition of "foreign police action," *Pet. Brf.* at 24, the seizure of Dr. Alvarez qualifies as one. The United States hired former Mexican police officers, and the enterprise was a joint effort between the DEA and the Mexican nationals it hired to carry out a classic police function: the seizure of a person indicted for a criminal offense.

The United States seeks to deprive the Mansfield Amendment of its plain meaning through a convenient but

incorrect application of principles of statutory construction. These principles cannot negate this overwhelming evidence of Congressional intent.

First, the United States asserts that the Mansfield Amendment was "[e]nacted in 1976 in response to the DEA's then longstanding practice of participating in foreign law enforcement operations. . ." *Pet. Brf.* at 23. This participation, however, was with the cooperation of foreign governments and not without their consent. The Mansfield Amendment restricted even consensual law enforcement activities abroad out of concern for the sovereignty of other countries, as well as the safety of U.S. personnel.[8]

The case law interpreting the Mansfield Amendment confirms that Respondent's seizure violated the law. In *United States v. Bridgewater*, 175 F. Supp. 2d 141, 145-46 (D.P.R. 2001), the court applied the *Ker-Frisbie* doctrine to permit trial of a defendant seized by the DEA near St. Kitts. However, the court indicated that exigent circumstances were not present, and that, were the arrest effected within the

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[8]The DEA's manual clearly prohibits this kind of unilateral action without numerous approvals which were not obtained in this case. The manual reflects the limitations placed on the DEA's foreign activities by the Mansfield Amendment. Drug Enforcement Agency, *Agents Manual, 651* Guidelines for DEA Foreign Activities, §B1 " No Unilateral Activities. DEA representatives will not engage or participate in unilateral investigative operations or agreement developed between the United States and the host government unless these activities have the express and explicit approval of a responsible host government official, the Ambassador, the DEA Country Attache and the DEA Administrator."

territorial waters of St. Kitts (and thus in a foreign country), it would have violated the Amendment.[9]

In *United States v. Streifel*, 507 F. Supp. 480, 489 (S.D.N.Y. 1981), the court examined the legislative history of the Amendment and found it inapplicable to the seizure of a foreign vessel on the high seas. In so doing, though, the court quoted from the legislative history of the Amendment noting that the severe restrictions on the DEA's activities in foreign countries were not applicable in that specific context.

The United States contends that the Mansfield Amendment contains no enforcement mechanism, citing *United States v. Zabaneh*, 837 F.2d 1249 (5th Cir. 1988). *Pet. Brf.* at 24. This point has no bearing on this case. The Mansfield Amendment simply confirms the fact that Respondent's abduction was unauthorized and unlawful. Congress has separately provided a damages remedy against the United States under the FTCA for this tort.

The United States argues that the exceptions to the Mansfield Amendment for exigent circumstances, 22 U.S.C. § 2291(c)(3), and for U.S. officers assisting a foreign agent making an arrest with the approval of the chief of mission, 22 U.S.C. § 2291(c)(2), somehow prove that Congress authorized DEA officers to engage in this kind of extraterritorial seizure. These exceptions, patently

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[9] *United States v. Green*, 671 F.2d 46, 52 n. 9 (1st Cir. 1982), is also indicative of how the Government has misconstrued the Mansfield Amendment. The *Green* court found that the Amendment was inapplicable in that case because Great Britain had consented to the seizure, but recognized that it was intended to reduce friction between the United States and foreign nations. Of course, in this case, the seizure resulted in diplomatic protest by Mexico, exactly the sort of friction Congress sought to avoid.

inapplicable to the facts of this case, do not support this construction.

The exigent circumstances exception makes sense only if the DEA's activities in foreign countries are sharply restricted. If the DEA's arrest authority is extraterritorial, there is no need for this exception.

Similarly, if, as the Government contends, the prohibition on "directly effect[ing]" an arrest outlawed only DEA arrests while participating in a joint action with foreign police, there would be no need to specifically permit the DEA agent to be *present* at an arrest. This second exception *only* makes sense if DEA activities are *sharply* restricted overseas and a special exception is needed even to permit the DEA to be present.

Finally, the United States contends that the Mansfield Amendment's prohibition means that the DEA authorization statute *must* permit extraterritorial arrests, because otherwise, the Mansfield Amendment would be meaningless. *Pet. Brf.* at 24. However, its argument ignores that the Mansfield Amendment is not limited to the DEA. It prohibits *any* officer or employee of the United States, whether that person works for the DEA, the FBI, the CIA, the ICE, the Secret Service, the National Park Service, or any other agency (other than the military), from making an arrest if the other conditions of the statute are met. This is confirmed by the statute's language, "notwithstanding any other provision of law." 22 U.S.C. § 2291 (a) (4). It is entirely sensible that the Mansfield Amendment outlawed extraterritorial arrests by all non-military agencies. The Mansfield Amendment is not deprived of meaning whether or not the DEA had extraterritorial arrest authority prior to its passage. The Government's disingenuous attempt to avoid the clear restrictions in the Mansfield Amendment must fail. The

Court of Appeal's holding that the DEA lacked authorization is correct.[10]

C. Section 878 Must be Construed Consistently With International Law Restrictions on Non-consensual Extraterritorial Abductions

1. International Law Prohibits All Exercises Of The Police Power By One State In The Territory Of Another State Without The Latter's Consent.

There is no doubt that Congress was aware of the long standing international law prohibition on non-consensual extraterritorial law enforcement activity when it enacted section 878 and the Mansfield Amendment. The illegality of unilateral extraterritorial exercises of police powers by one nation in the territory of another cannot be seriously questioned.[11]

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[10] 10 U.S.C. § 374 (b)(1)(D), *Pet. Brf.* at 27, does not support the United States' claim that the Mansfield Amendment was inapplicable here. Section 374 (b)(1)(D) concerns *the military's* apprehension of *terrorists* in a foreign country. It has no relationship to the powers of subordinate DEA employees in a plainly criminal context.

[11] The Court of Appeals' decision that the norm prohibiting such abductions was not actionable under the ATCA does not affect the existence of universally accepted norms prohibiting the exercise of law enforcement authority in other countries. 331 F. 3d at 620. Although the *en banc* Court of Appeals, unlike the panel decision, *Alvarez-Machain*, 266 F. 3d 1045, 1050 (9th Cir. 2001), concluded that there was no international customary norm barring transborder abductions;

From the beginning of the Republic, this Court has recognized that international law prohibits one state from exercising its police power in the territory of another state in the absence of consent. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). Every nation has complete and exclusive sovereignty over its own territory. *Id.* No country may lawfully exercise police powers in the territory of another without consent. As emphasized by Justice Story in *The Apollon*, a case involving a U.S. seizure of a foreign vessel in a Spanish port:

> It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the law of nations.

22 U.S. (9 Wheat.) 362, 370-71 (1824). The non-consensual abduction of a national from his home country by the agents of another country clearly violates this norm.

The contemporary power of this ancient principle is recognized by the *Restatement (Third) of the Foreign Relations Law of the United States*, which summarizes the law in these terms: "[a] state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state." Restatement (Third) of Foreign Relations Law, § 432(2) (2003).

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this conclusion is incorrect for the reasons set forth herein.

The international authorities in support of this principle are numerous and consistent. The doctrine of territorial integrity is clearly protected by a range of international agreements.[12] Other more recent multilateral conventions specifically targeting drug offenses reaffirm this basic principle.[13] Customary international law is equally clear. According to the Permanent Court of International Justice, the "first and foremost restriction imposed by international law upon a State is that -- failing the existence of a permissive rule to the contrary -- it may not exercise its powers in any form in the territory of another State." S.S. Lotus (*Turkey v. France*), 1927, P.C.I.J. (ser. A) No. 10, at 18.

In the most famous abduction case in the modern age, the seizure of Adolph Eichmann by Israeli agents in Argentina, the U.N. Security Council adopted without opposition and with the affirmative vote of the United States, a resolution condemning the kidnaping and requesting "the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and rules of international law. . ." 112 U.N. Doc. S/4349 (1960). This acknowledged violation of international law was redressed only when Argentina and Israel mutually resolved to consider

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[12]*See, e.g.*, U.N. Charter, Art. 2, para 4 (June 26, 1945) 59 Stat. 1037, T.S. No. 993; Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2420, T.I.A.S. No. 2361, as amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, at art. 20.

[13]*See* 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Art. 2 (2) and (3) (entered into force for the United States November 11, 1990, *reprinted in* 28 I.L.M. 493 (1989)). [hereinafter 1998 Vienna Convention].

the incident closed. *In re Eichmann,* 5 Whiteman, Digest International law, §§ 208-14 (1961). The consistent disposition of other, less famous cases (*See* notes 14-16, *infra*) reaffirms that "[s]tates must not perform acts of sovereignty within the territory of another State." L. Oppenheim, International Law § 144b (H. Lauterpacht, 8th ed. 1995).

In addition to the more general authorities establishing this norm of customary law, the United States and Mexico specifically confirmed the norm in a bilateral agreement demonstrating their mutual acceptance of these limitations. In a 1990 treaty, the United States and Mexico agreed to cooperate in narcotics investigation and law enforcement. The treaty specifically provided that "[t]his Agreement does not empower one party's authorities to undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority exclusively entrusted to the authorities of that other Party by its national laws or regulations." *Agreement Between the United States of America and the United Mexican States On Cooperation in Combating Narcotics Trafficking and Drug Dependency*, July, 30, 1990, U.S.-Mexico, T.I.A.S. No. 11, 604.

Further, both state parties agreed that "[w]ithin the spirit of good neighborliness and cooperation governing the relations between the Parties, they agree to consult in advance with each other in the Commission, on actions that one of the Parties may intend to undertake, which may affect the other Party in a manner inconsistent with the object and purpose of this Agreement". *Id.* This treaty clearly reflects that the United States and Mexico fully recognize the norm of territorial sovereignty that prohibits non-consensual extraterritorial seizures in each other's territory.

The applicability of these standards here is readily apparent. As noted by Professor Louis Henkin, former U.S. member of the United Nations Human Rights Committee:

> [w]hen done without consent of the foreign government, abducting a person from a foreign country is a gross violation of international law and gross disrespect for a norm high in the opinion of mankind. It is a blatant violation of the territorial integrity of another state. . .

Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 J. Marshall L. Rev. 215, 231 (1992).

There are **no** cases upholding the lawfulness of an abduction like the one in this case. All of the cases involving extraterritorial arrests involve either an abduction in a territory that is not within the sovereign domain of a foreign nation, *e.g.*, the high seas;[14] or an abduction with which the territorial state cooperated or did not object;[15] or an abduction

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[14] *United States v. Younis*, 681 F. Supp. 909 (D.D.C. 1988); *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979).

[15] *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997) (Military operation specifically authorized by President and Secretary of Defense.); *Matta-Ballasteros v. Henman*, 896 F.2d. 255 (7th Cir.), cert. denied 498 U.S. 878 (1990); *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Çir. 1988) (arrested by Mexican officials); *United States v. Toro*, 840 F.2d 1221 (5th Cir. 1988) (arrested by Panamanian officials); *United States v. Zabaneh*, 837 F.2d 1249 (5th Cir. 1988) (no protest by the Guatemalan government); *United States v. Rosenthal*, 793 F.2d 1214 (11th Cir. 1986) (arrested by Columbian officials); *United States v. Darby*, 744 F.2d 1508 (11th Cir. 1984) (arrested by Honduran officials); *United States v. Cordero*, 668 F.2d 32 (1st Cir.

undertaken without the direct participation of the United States government.[16] This case is unique precisely because transborder abductions like this one are universally condemned and avoided by governments.[17]

1981) (arrested and deported by Panamanian officials); *United States v. Reed*, 639 F.2d 896 (2d Cir. 1981) (no protest by Bahamian government); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975) (no protest by Bolivian government); *United States v. Herrera*, 504 F.2d 859 (5th Cir. 1974) (arrested by Peruvian officials); *United States v. Insull*, 8 F. Supp. 310 (N.D. Ill. 1934) (arrested by Turkish officials); *United States v. Unverzagt*, 299 F. 1015 (W.D. Wash. 1924), *aff'd sub nom., Unverzagt v. Benn*, 5 F.2d 492 (9th Cir. 1925) (no protest by Canada, where the abduction took place).

[16] *Ex parte Lopez*, 6 F. Supp. 342 (S.D. Tex. 1934); *United States v. Zabaneh, supra*; *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974) (U.S. agents not directly involved in abduction).

[17] The international authorities finding transborder abduction to be unlawful are similarly overwhelming. *See e.g., In re Vincenti*, (1920), in International Law, 1 Hackworth, Digest 624 (1940) (U.S. released a U.S. citizen seized in the British West Indies, after protest by Great Britain); *In re Jolis*, [1933-34] Ann. Dig. 191 (Tribunal Correctionnel d'Avesnes) (invalidating the arrest of a Belgian national by French police in Belgium on the ground that the Belgian government lodged an official protest with the French government). *Accord* Preuss, *Settlement of Jacob Kidnaping Case*, 30 Am. J. Int'l L. 123 (1936); *Casablanca Case (Fr. v. Germ.)*, Hague Ct. Rep. 110 (Scott ed. 1916) (holding, in regard to German deserters from the French Foreign Legion seized by the French in 1909, that it "was wrong for the French military authorities not to respect, as far as possible, the actual protection being granted to these deserters in the name of the German consulate"); *see also S. v. Ebrahim*, 1991 S. Afr. L. Rep. 1 (Apr.-June 1991) (barring the prosecution of a defendant abducted by agents of South Africa from another nation in violation of international law); *Bennett v. Horseferry Road Magistrates' Court*, 3 All E.R. 138 (House of Lords 1993) (transborder abductions are a violation of international law).

The Executive branch, in settings other than its litigation position in this case, has faithfully recognized that extraterritorial abductions by government agents violate international law. The former Legal Advisor to the Department of State testified before Congress that "[f]orcible abductions from a foreign state clearly violate this principle" of sovereignty and that "the United States has repeatedly associated itself with the view that unconsented arrests violate the principle of territorial integrity." FBI Authority to Seize Suspects Abroad, Hearing Before the Subcomm. Civil & Constitutional Rights of the House Jud. Comm., 101st Cong. 1st Sess. (1989) ("Oversight Hearings") (Sofaer statement).

Indeed, when the Soviet Union attempted to kidnap a Soviet citizen within the territory of the United States, the State Department, drawing on the customary understanding among states, declared that "the Government of the United States cannot permit the exercise within the United States of the police power of any foreign government." 19 Dep't of State Bull. 251 (1948).

Similarly, the Justice Department's Office of Legal Counsel, addressing a hypothetical strikingly similar to the Alvarez incident ten years before the fact, concluded that "it appears to be the case that a forcible abduction, when coupled with a protest by the asylum state, is a violation of international law." Extraterritorial Abduction by the Federal Bureau of Investigation, U.S. Op. Off. Legal Counsel. 5433 (1980). There is no evidence that the Department of Justice or any other Executive department has repudiated this conclusion as a matter of international law. *See* Oversight Hearings, *supra*, at 20-21 (Barr statement), 34-37 (Sofaer statement).

The Barr Opinion, 1989 O.L.C. Lexis 19, concluded that the President or the Attorney General has the authority

under U.S. domestic law to order the extraterritorial arrest of foreign criminal suspects, even though such an arrest would be in violation of principles of customary international law. The opinion, however, accepts the premise that state-sponsored abductions in foreign countries violate international law and concludes that nothing in U.S. constitutional or statutory law necessarily bars such abductions if ordered by the President. No such order was made here.

This Court's decision in *United States v. Alvarez-Machain* regarding the criminal prosecution against Dr. Alvarez, is not contrary. 504 U.S. 655 (1992). The only question presented was whether "a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts." *Id* at 657. This Court limited its decision to an interpretation of the bilateral Extradition Treaty between the United States and Mexico, finding that there was no violation. *Id.* at 669-70 ("Respondent and his *amici* may be correct that Respondent's abduction was shocking. . . and that *it may be in violation of general international law principles*. . . We conclude, however, that Respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico. . .") (citation and internal quotation omitted) (emphasis added). This Court did not hold that the Government's actions were, in all other respects, lawful, or rule that Dr. Alvarez had no remedy for his unlawful abduction.

Indeed, in *Ker v. Illinois*, after holding that the illegality of Ker's seizure posed no obstacle to criminal prosecution, this Court stated that "[t]he [kidnapped] party himself would probably not be without redress, for he could sue [the kidnapper] in an action of trespass and false

imprisonment, and the facts set out in the plea would without doubt sustain the action." 119 U.S. 436, 444 (1886). This is that action.

2. Section 878(a) Should Not Be Interpreted to Authorize Violations of International Law.

For two centuries, this Court has adhered faithfully to Chief Justice John Marshall's admonition that acts of Congress "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); Restatement (Third), *supra*, § 114 ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.")

When Congress clearly manifests its intent to override international law and the statute cannot be reconciled with prior international obligations, the legislative will prevails. But, in the absence of such a clear statement of repudiation, the statutory interpretation that best conforms to this nation's international obligations under customary international law and treaties is controlling. *See, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995); *Weinberger v. Rossi*, 456 U.S. 25 (1982); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Lauritzen v. Larsen*, 345 U.S. 511, 578 (1953); *MacLeod v. United States*, 229 US 416, 434 (1913) ("The statute should be construed in the light of the purpose of the government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be

assumed that Congress proposed to violate the obligations of this country to other nations. . ."). In each of these cases, the Court's interpretation of international norms restricted the reach of domestic statutes couched in broad terms.

The *Charming Betsy* doctrine serves two critical functions which are relevant here. As Justice Scalia affirmed in his dissent in *Hartford Fire Insurance Co. v. California*, it first reduces friction with foreign sovereigns by assuring U.S. adherence to international law as far as possible. 509 U.S. 764, 815 (1993) (Scalia, J, dissenting) ("Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international law limits on jurisdiction to prescribe.")

In addition, the *Charming Betsy* doctrine serves the separation of powers, presumptively tilting every question of statutory interpretation away from the possibility of declaring the United States to be in breach of international law, and sparing the political branches embarrassment in the conduct of the nation's foreign affairs. *Chew Heong v. United States*, 112 U.S. 536, 540 (1884).

The federal courts have followed *The Charming Betsy* doctrine in a vast range of cases. On the strength of *The Charming Betsy*, courts have assumed that Congress, in enacting smuggling and drug statutes, intended to limit its exercise of the power to define and punish felonies committed on the high seas in conformity with the international law of jurisdiction.[18] Other decisions have made clear that, in the absence of Congressional intent to override international law,

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[18] *See, e.g., United States v. Robinson*, 843 F.2d 1 (1st Cir. 1988); *United States v. Marino-Garcia*, 679 F.2d 1373 (11th Cir. 1982), *cert. denied sub nom., Pauth-Arzusa v. United States*, 459 U.S. 1114 (1983).

the Executive's investigatory powers are limited by international norms governing jurisdiction to enforce.[19] Subject matter jurisdiction under various regulatory statutes, including the antitrust and securities laws,[20] and the criminal code,[21] have been held to be limited by international legal principles, subject always to Congressional expansion.

There is neither language nor legislative history in Section 878 that evinces any intent to authorize arrests and abductions in violation of the most basic principles of customary international law. Even when Congress uses broad language in the statute, its extraterritorial application may be blocked by international standards, *See Equal Employment Opportunity Commission v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (hereinafter "*Aramco*").

That principle applies *a fortiori* to this case, in which Section 878(a) does not refer to arrests in violation of international law, does not refer to the customary international authorities against such a practice, and certainly does not override them. Nor does the statute explicitly or implicitly override the Agreement between the United States of America and the United Mexican States on Cooperation in Combatting Narcotics Trafficking and Drug Dependency, signed 23

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[19] *See, e.g., Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984); *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980).

[20] *See, e.g., Pac. Seafarers, Inc. v. Pac. Far E. Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969); *United States v. Firestone Tire & Rubber Co.*, 518 F. Supp. 1021 (N.D. Ohio 1981); *Nat'l Maritime Union of Am. v. NLRB*, 267 F. Supp. 117 (S.D.N.Y 1967).

[21] *See, e.g., United States v. bin Laden*, 92 F. Supp. 2d 189, 213-14 (S.D.N.Y. 2000).

February 1989, entered into force 30 July 1990, T.I.A.S. No. 11,604.

This Agreement provides that, "this Agreement does not empower one Party's authorities to undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority exclusively entrusted to the authorities of the other Party by its national laws or regulations." *Id.*, at Art. I.

This bilateral agreement, signed and ratified before Dr. Alvarez' abduction, underscores the full adherence of the political branches of our government to the international law norms which preclude the Government's interpretation of the DEA's powers. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). "There is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action. 'A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.'" *Id.* at 252 (*quoting Cook v. United States*, 288 U.S. 102, 120 (1933)).

3. Even if the Executive Branch Has the Authority to Violate International Law, that Power May Not Be Exercised Without the Approval of the President.

As the five concurring judges in the Court of Appeals found, Congress certainly did not authorize low-level sub-cabinet officials to make the decision to engage in acts which violate international law. *Alvarez-Machain*, 331 F. 3d at 642 (Fisher J., concurring). ("It is evident . . . that neither Congress nor the Executive has expressed an intent to allow sub-cabinet-level law enforcement officials in the DEA to be

the final arbiters of [their] authority.") The evidence in this case is clear that the operation was authorized by Deputy DEA Administrator Peter Gruden and that DEA Administrator Jack Lawn did not even know of, much less authorize, the operation. *Id.*

Even the 1989 Barr Opinion made it clear that the asserted authority to violate international law depended on the involvement of the President or the Attorney General. Only then can the trade-offs between the pursuit of American interests abroad and the cost of violating international law be carefully considered.

There is simply no basis for believing that Congress intended to authorize low-level officials in the DEA, much less any DEA agent, as the Government argues, *Pet. Brf.* at 35, to make a decision to violate the sovereignty of a foreign ally. Certainly, at the very least this Court should expect the clearest statement from Congress, that it had that intent before issuing any decision conferring that extraordinary power on subordinate DEA officials.

D. The Court of Appeals Correctly Found Section 878(a) Should be Construed Consistent with the Long-Recognized Presumption Against the Extraterritorial Application of Statutes.

The Court of Appeals applied the presumption against extraterritorial application of statutes to hold that Congress had not expressly granted this authority to the DEA.

The presumption against extraterritorial application of the laws is well established. *Smith v. United States*, 507 U.S. 197, 204 (1993); *Aramco, supra*, 499 U.S. at 248; *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949). "It is a longstanding

principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Smith*, 507 U.S. at 204 (internal quotation omitted).[22]

Thus, in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), this Court applied the presumption against extraterritoriality to a statute prohibiting the Attorney General from returning refugees to a country where they might face persecution. The statute did not explicitly address whether it applied to aliens seized outside United States territory, and the Court held that the statute did *not* apply to Coast Guard seizures of Haitians on the high seas. In doing so, this Court decisively rejected the argument that the presumption against extraterritoriality only applies when certain limited policy rationales are served. 509 U.S. at 173-74.

The United States attempts to negate the presumption of extraterritoriality by arguing that Section 878(a) in fact confers extraterritorial arrest power upon the DEA. However, these arguments are not based on the express terms of the statute, but on canons of statutory construction. *Pet. Brf.* at 18. These methods of statutory interpretation do not create the sort of "express" statutory grant that is necessary to overcome the presumption against extraterritoriality. To find express intent, courts are to look solely at the *language of the statute*. *See e.g., Aramco*, 499 U.S. at 248.

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[22]The Government attempts to limit this presumption by implying that this doctrine serves limited policy rationales implicated by private lawsuits and thus has no application to legislation that does not touch on such areas. *Pet. Brf.* at 34. However, this Court has decisively rejected the United States' mode of analysis, saying that the presumption serves multiple policy goals and is not limited to certain specific types of legislation. *See, e.g., Smith*, 507 U.S. at 204 n 5.

The United States' main contention is that the presumption does not apply to criminal statutes. While it is true that the presumption does not apply to substantive criminal laws where such laws are not logically dependent upon a territorial limitation, *United States v. Bowman*, 260 U.S. 94, 98 (1922), the presumption applies in full force to the power of extraterritorial arrest, for several reasons.

First, the power to arrest extraterritorially implicates well-established norms of international law. These norms are not implicated when the United States regulates *conduct* abroad. Second, the power to seize a person poses far greater danger of offending other nations or causing an international incident than merely regulating conduct abroad. Arresting a person in the United States, or on the high seas, or through a consensual extradition, for overseas conduct simply does not raise the same issues implicated by Dr. Alvarez' abduction. Thus, there are compelling reasons why the "criminal law exception" to the presumption against extraterritoriality should not apply to enforcement activities.[23]

The United States contends that *Maul v. United States*, 274 U.S. 501 (1927), extends *Bowman* to enforcement powers. However, *Maul* never mentions the presumption against extraterritoriality. Moreover, it involved U.S. citizens and a U.S. boat. Also, *Maul* involved a statute that permitted the Coast Guard to seize boats "as well without as within their respective districts." The statute in *Maul* thus explicitly authorized extraterritorial seizures. The United States

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[23] *Bowman* says nothing about enforcement powers. *See id.* at 96-97 ("The sole objection [made by the defendants in *Bowman*] was that the crime was committed without the jurisdiction of the United States or of any state thereof and on the high seas or within the jurisdiction of Brazil.").

confuses the issue by discussing a later-passed statute, also discussed in the *Maul* opinion, permitting seizures by Coast Guard ships in their own districts as well as in the districts of other Coast Guard ships, but not outside territorial waters. This Court held in *Maul* that the later statute did not repeal the earlier statute that authorized extraterritorial seizures. *Maul* is also distinguishable in that it involved the *military* (*i.e.*, the Coast Guard), and thus implicated the Commander-in-Chief power in a manner not implicated in this case.[24]

The lower-courts have correctly concluded that *Bowman* applies to the extraterritorial application of criminal statutes regulating primary conduct. Thus, in *United States v. Plummer*, 221 F.3d 1298, 1304 (9th Cir. 2000), the Court compiled cases that applied *Bowman* and found that all of them involved the extraterritorial application of substantive criminal law, not enforcement power.[25]

The *Bowman* rule has been invoked on the issue of the substantive reach of a criminal statute (which *Bowman* governs) in cases where the enforcement power was also at issue. However, the courts uniformly relied on authorities

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[24] Just eight years after *Maul*, Congress rejected this Court's construction of the Coast Guard statute and passed a new statutory scheme that limited the authority of the Coast Guard to seize vessels on the high seas. *See United States v. Gonzalez*, 875 F.2d 875, 879 (D.C. Cir. 1989). *Maul* has rarely been cited since, and it is not clear that it is good law even on the precise point decided.

[25] In *The Rosalie M.*, 4 F.2d 815, 816 (S.D. Tex. 1925), *aff'd on other grds.*, 12 F.2d 970 (5th Cir. 1926), the District Court did cite *Bowman* as justification for a seizure of a foreign-flagged boat in international waters. However, the Court of Appeals affirmed on a different ground, assuming the illegality of the seizure but holding that it did not deprive the courts of jurisdiction over the vessel.

other than *Bowman* to find that the government agency at issue had enforcement power.[26]

The United States also argues that it is implausible that Congress intended to criminalize extraterritorial conduct without granting the DEA the power to arrest violators of those laws. *Pet. Brf.* at 19. This is a *non sequitur*. It assumes that non-consensual extraterritorial abductions are the only means of apprehending suspects. In fact, there is a broad array of bilateral and multilateral methods to lawfully apprehend criminal suspects, including extradition treaties.

Moreover, there are other law enforcement agencies, such as the Coast Guard, which have express extraterritorial seizure authority and which can enforce such laws. There are formal (e.g. extradition treaties) and informal diplomatic

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[26] *See United States v. Yunis*, 924 F.2d 1086, 1092-94 (D.C. Cir. 1991) (Navy has statutory and regulatory authority to assist in arrest in international waters); *United States v. Walczak*, 783 F.2d 852, 856-57 (9th Cir. 1986) (upholding a search by United States Customs agents conducted at a Canadian airport pursuant to an international agreement between the United States and Canada); *United States v. Postal*, 589 F.2d 862, 872 n. 15 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979) (Coast Guard has *statutory* authority to board vessels); *United States v. Streifel*, 507 F. Supp. 480, 483-84 (S.D.N.Y.), *aff'd* 665 F.2d 414 (2d Cir. 1981) (same); *United States v. Cedena*, 585 F.2d 1252, 1257-58 (5th Cir. 1978), *overruled on other grounds*; *United States v. Michelena-Orovio*, 719 F.2d 738, 757 (5th Cir. 1983), *cert. denied*, 465 U.S. 1104 (1984) (same); *United States v. Keller*, 451 F. Supp. 631, 637 (D.P.R. 1978) (same); *cf. United States v. Noriega*, 746 F. Supp. 1506, 1539-40 (S.D. Fla. 1990), *aff'd*, 117 F.3d 1206 (11thCir. 1997), *cert. denied*, 523 U.S. 1060 (1998) (citing *Bowman* on substantive reach of statute, but ruling legality of military invasion of Panama to capture defendant was unreviewable political question). If *Bowman* were applicable to enforcement powers, there would have been no need for these courts to look to other legal authorities for authorization of the challenged enforcement activities.

means of obtaining the rendition of criminal suspects. That Congress would choose not to authorize a particular law enforcement agency to make extraterritorial arrests is in no way inconsistent with the extraterritorial reach of some of our criminal laws. For this reason, Judge O'Scannlain was incorrect in concluding in his dissent below that merely because Congress had passed extraterritorial narcotics laws the DEA must *ipso facto* have the power to violate other nations' sovereignty. *See* Pet. Brf. at 11,20-21.[27]

The United States argues that the presumption against extraterritoriality should not be read to limit executive power over foreign affairs. However, nothing in the Court of Appeals' opinion does so. The presumption against extraterritoriality is invoked in determining what powers *Congress* intended to grant to the DEA.[28]

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[27]The United States turns the law on its head by arguing that because the Court of Appeals correctly recognized that the actions of the United States military pursuant to the war power might be beyond the reach of this sort of action, the DEA must also have that power. *Pet. Brf.* at 38. It is well established that the judiciary's power to adjudicate war powers issues is sharply limited. However, the DEA is not the military, and adjudications concerning the scope of DEA authority simply do not raise the same concerns.

[28]The Government's cases do not undermine the application of this presumption here. *Department of the Navy v. Egan*, 484 U.S. 518, 529-30 (1988), is distinguishable. In *Egan*, the Court held that security clearances, which were expressly authorized by Congress, were not subject to administrative review where Congress had not provided for a review procedure. Unlike the area of security clearances, in which the Executive has almost plenary executive discretion, Congress has traditionally and properly set the bounds of executive power to effectuate arrests. *Haig v. Agee*, 453 U.S. 280, 293-94 (1981), held that the executive branch had the power to revoke the passport of an ex-CIA operative who was releasing classified information to the public. *Haig*

The Government's suggestion that the Court of Appeals opinion leaves the United States with no choice but the use of military force is specious and at odds with the sophisticated use of international law that presents many alternatives to unilateral military action.[29]

II. The Foreign Country Exception of the FTCA Has Never Applied to Tortious Conduct Initiated By

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noted that Congress had long delegated to the Executive Branch the authority to determine the conditions under which passports are issued. No analogous delegation occurred here. *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1946), involves the *scope*, not the existence, of judicial review where the denial of a license to operate a commercial flight was based on national security grounds by the President. This case does not require the courts to review the determination of the President of what is necessary for national security; rather, this case concerns whether lower executive branch officials exceeded delegated powers.

[29] Citing *Kasi v Angelone*, 300 F. 3d 487 (4th Cir), *cert. denied*, 537 U.S. 1025 (2002), the government claims that limiting the DEA's authority to engage in extraterritorial arrests will hamper its efforts in the war on terrorism. *Pet. Brf.* 31-32. But *Kasi* case offers a textbook example of lawful cooperative enforcement efforts between the United States and another country in a terrorism case: unlike Mexico in this case, Pakistan did not and to this day does not object to the Kasi abduction. According to the case report, "the record is silent as to what extent foreign nationals were involved in Kasi's capture, initial imprisonment, and return to the United States" not because that evidence does not exist but because of "security concerns."*Id.*, at 496. Moreover, the district judge in *Kasi* was able to handle sensitive issues relating to the circumstances of Kasi's arrest and interrogation through *in camera* hearings and other special procedures. *Id.*, at 496 n3 and 507 *et seq*. The district judge in this case was similarly able to handle discovery issues without difficulty or inappropriate disclosure.

United States Officials in This Country With Extraterritorial Effect.

Based on this Court's decision in *Richards v. United States*, 369 U.S. 1 (1962), the lower courts uniformly have held that an FTCA suit does not arise in a foreign country and is thus not barred where it alleges that conduct *within the United States* caused harmful extraterritorial effect.[30]

The "headquarters doctrine" originated in *Richards, supra*. The issue in *Richards* was an FTCA choice of law issue based on whether the "act or omission occurred" in Oklahoma (where the negligent act took place) or Missouri (where the injury was suffered). This Court held that the act or omission occurs where the tortious act took place, and therefore applied Oklahoma law.

The United States attempts to distinguish *Richards* by arguing that the result should be different when the foreign country exception is in play. This contention has no merit. As the United States admits, the foreign country exception's purpose was to prevent the United States from being subjected to the tort law of foreign jurisdictions. *Pet. Brf.* at 46. What the headquarters doctrine does, however, is subject the United States to liability *under the state tort law of one of the fifty states* for torts committed in that state that have extraterritorial effect. In other words, just as in *Richards*, the effect of a headquarters claim is simply to apply the local law

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[30] It is misleading to label the headquarters doctrine as "judicially created" as the United States does. *Pet Brf* at 17, 45. The FTCA does not define what claims "arising" in a foreign country means. The judiciary did not graft an exception onto the statute but merely construed the word "arising," holding that claims based on conduct *in the United States* do not arise in foreign countries, even if they cause extraterritorial effect.

of the *American* jurisdiction where a tortious act took place in determining whether the act was tortious. There is no logical reason why a different rule would apply simply because the *effect* of the tort is felt outside the country.

Indeed, every federal court that has decided the issue has recognized the validity of the headquarters doctrine. *Nurse v. United States*, 226 F.3d 996, 1003 (9th Cir. 2000); *Couzado v. United States*, 105 F.3d 1389, 1395-96 (11th Cir. 1997); *Cominotto v. United States*, 802 F.2d 1127, 1130 (9th Cir. 1986); *Newborn v. United States*, 238 F. Supp. 2d 145, 148-49 (D.D.C. 2002), *aff'd*, 2003 WL 23120144 (D.C. Cir. Dec. 2002); *Macharia v. United States*, 238 F. Supp. 2d 13, 22 n 3 (D.D.C. 2002); *Kielczynski v. United States*, 128 F. Supp. 2d 151, 157-58 (E.D.N.Y. 2001); *Romero v. Consulate of the United States*, 860 F. Supp. 319, 325 n 14 (E.D.Va. 1994); *MacCaskill v. United States*, 834 F. Supp. 14, 17 (D.D.C. 1993); *Donahue v. United States Dept. of Justice*, 751 F. Supp. 45, 48 (S.D.N.Y. 1990); *cf. Eaglin v. United States*, 794 F.2d 981, 983 (5th Cir. 1986) (declining to decide whether headquarters doctrine exists); *Beattie v. United States*, 756 F.2d 91, 97-98 (D.C. Cir. 1984) (assuming *arguendo* that the doctrine exists).[31]

The United States nonetheless asks that this Court overturn these cases because the headquarters doctrine contravenes the purpose of the foreign country exception. There is no doubt that the foreign country exception is

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[31] *Eyskens v. United States*, 140 F. Supp. 2d 553, 561 (E.D.N.C. 2000), construed the headquarters doctrine most narrowly, limiting it to cases where the act that was the most proximate cause of the injury took place in the United States. However, even under *Eyskens*, Respondent has a valid headquarters claim, as the act that caused his injury, *i.e.*, his abduction, was ordered and controlled by federal officers in the United States.

designed to preclude the United States from being subjected to foreign tort rules. However, the United States was not subjected to such rules in this case; the Court of Appeals applied California law, not Mexican law. The United States argues that it does not make sense for California law to apply to the seizure of a Mexican citizen inside Mexico. It makes no more sense for any other body of law to apply to the decision of United States governmental officials based in California to arrest a suspect in a criminal case pending in Los Angeles.

The United States argues that even if the headquarters doctrine exists, in intentional tort cases the tort generally occurs where the wrongful act occurred. *Pet Brf.* at 45. This argument should be rejected. First, it ignores the District Court's finding that the United States planned and ordered the execution of this operation in the United States.[32] Second, were this argument recognized, the United States would face liability for negligently causing a harm from the United States, (because this would be covered by the headquarters doctrine), but where the United States *ordered* the harm to occur, the United States would be immune. There is no basis in the FTCA to countenance such an anomalous result.

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[32]This is very distinct from a case such as *Landry v. A-Able Bonding, Inc.*, 75 F.3d 200, 205 n 7 (5th Cir. 1996), where an arrest was made in Texas based on a Louisana warrant. The warrant in *Landry* was not an order to arrest; it was permission to arrest. *Id.* at 204-05. This operation was *directed* by DEA officials in California.

III. THE COURT OF APPEALS PROPERLY REJECTED THE DISTRICT COURT'S HOLDING THAT THIS UNLAWFUL ARREST COULD BE TRANSFORMED INTO A VALID "CITIZEN'S" ARREST.

The FTCA does not require, as the United States implies, that federal officers are always permitted to do everything a private citizen may do. Rather, the United States is liable "to the same extent as a private individual under like circumstances." The Courts of Appeal have held that FTCA false arrest claims are subject to a host of more specific rules as compared to citizen's arrests and thus a federal law enforcement agent does not act "under like circumstances" to a private citizen. *Hetzel v. United States*, 43 F.3d 1500, 1503 n. 4 (D.C. Cir. 1995); *Caban v. United States*, 728 F.2d 68, 73-74 (2d Cir. 1984); *Ting v. United States*, 927 F.2d 1504, 1514 (9th Cir. 1991); *Arnsberg v. United States*, 757 F.2d 971, 978-79 (9th Cir. 1984). These holdings are based on this Court's discussion of the FTCA in *Feres v. United States*, 340 U.S. 135, 142 (1950) ("[T]he liability assumed by the Government. . . is that created by 'all the circumstances,' not that which a few of the circumstances might create.") (citing 28 U.S.C. § 2674).

The United States ignores the case law, which is directly on point, and holds that citizen's arrest laws do not affect liability under the FTCA because they do not meet the "like circumstances" requirement, and relies on inapplicable case law from other areas of law. *United States v. Sealed Juvenile I*, 255 F.3d 213, 217-18 (5th Cir. 2001), was a Fourth Amendment challenge to a seizure, which was justified based on a Texas statutory scheme that expressly made customs officers subject to the rules that apply to private citizen's

arrests. This case is distinguishable both because in the Fourth Amendment context, there is no "like circumstances" requirement and also because the Texas scheme differs markedly from California's false arrest laws. *United States v. Layne*, 6 F.3d 396, 398-99 (6th Cir. 1993), *cert. denied*, 511 U.S. 1006 (1994), and *Ward v. United States*, 316 F.2d 113, 117 (9th Cir.), *cert. denied*, 375 U.S. 862 (1963), are also Fourth Amendment, not FTCA cases.

There is simply no analogy between an ordinary citizen's arrest and the rules that govern agents of the government; thus, the "like circumstances" requirement is not met. Additionally, state legislatures (including California's legislature) write specific statutory schemes that govern what can and cannot be done when executing an arrest warrant (or purportedly executing an arrest warrant). The Ninth Circuit's conclusion that California's citizen's arrest framework does not authorize the conduct here is a pure question of state law that should not be reviewed by this Court. *United States v. Varig Airlines*, 467 U.S. 797, 816 n 12 (1984). The application of citizen's arrest provisions to these schemes would simply make the rules that govern arrests less clear and more indeterminate.

Permitting law enforcement to use "citizen's arrests" to escape restrictions on their authority may also violate the Fourth Amendment. The Fourth Amendment applies to state actors and imposes probable cause and reasonableness requirements on their seizures to which citizens making citizen's arrests are not subject. Thus, a city policy that attempted to substitute "citizen's arrests" for formal arrests by the police was declared unconstitutional in *Corcoran v. Fletcher*, 160 F. Supp. 2d 1085, 1091-92 (C.D.Cal. 2001). It is conceivable that a police officer or a federal law enforcement agent *can* make a citizen's arrest in a situation

where he or she is in "like circumstances" to a private citizen. For instance, an off-duty officer who happens upon the commission of a felony in progress is entitled to make a citizen's arrest just like an ordinary citizen may. *Monteiro v. Howard*, 334 F. Supp. 411 (D.R.I. 1971). However, the distinction is between the officer who happens upon a crime while outside his or her jurisdiction, and a planned law enforcement operation by agents who have no authority to effect the seizure. The latter are *not* in "like circumstances" to an ordinary citizen making an arrest. *Id.* at 415 (distinguishing situation where peace officer goes outside of jurisdiction with purpose of making arrest).

IV. ALLOWING RECOVERY UNDER THE FEDERAL TORT CLAIMS ACT DOES NOT VIOLATE SEPARATION OF POWERS OR RAISE A POLITICAL QUESTION.

This Court has emphasized that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v Carr*, 369 U.S. 186, 211 (1961). The United States asserts a broad principle that would preclude any judicial review of actions by any executive official, at any level, if it occurs in a foreign country, no matter how serious the injury imposed or how illegal the conduct. This Court's decisions provide no support for such unlimited executive immunity from judicial review. To the contrary, this Court has frequently considered the legality of executive actions even in the realm of foreign policy when they allegedly infringe upon the rights of individuals. Indeed, it is the Government's position, precluding all judicial review of executive action touching foreign policy, that would raise grave separation of powers

concerns, especially when it would preclude judicial enforcement of federal statutes.

Petitioners' claim that judicial review is foreclosed because of separation of powers concerns and the political question doctrine is refuted by no less than *Marbury v. Madison*, 5 U.S. (1 Cranch) 103, 163 (1803) ("[T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). This Court in *Marbury* affirmed that the judiciary can provide remedies against the executive when there is a specific duty, created by law, to a particular person. *Id.*

This Court has frequently engaged in judicial review of executive actions, even those touching on foreign policy concerns, when the rights of individuals are involved. For example, this Court has reviewed on the merits the constitutionality of the President's use of executive agreements which allegedly violate property rights. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981).

This Court's decision in *Japan Whaling Ass'n v. American Cetacea Society*, 478 U.S. 221 (1986), is exactly on point in upholding the necessity for judicial review, even if foreign policy is implicated, when a federal statute creates rights of individuals. Federal statutes required the Secretary of Commerce to certify whether Japan's whaling practices violated the International Convention for the Regulation of Whaling by harvesting more whales than the Convention allowed. Environmental groups sued and the argument was made that judicial review was precluded because the matter concerned foreign policy. This Court emphatically rejected that claim and explained that "courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a

recurring and accepted task for the federal courts." *Id.* at 230. This, of course, is exactly the situation presented by this case: Respondent is suing under federal statutes to remedy a violation of his individual rights. He is not bringing a general challenge to "policy choices" of the President. *Id.*

The cases invoked by Petitioners do not support judicial abstention in this damage action. Petitioner Sosa repeatedly cites to this Court's decision in *Banco Nacional de Cuba v. Sabbattino*, 376 U.S. 398 (1964). *See, e.g., Sosa Brf.*, at 30-33. Petitioner Sosa, though, pointedly omits this Court's declaration that "it cannot be contended that the Constitution allocates this area to the exclusive jurisdiction of the executive, for the judicial power is expressly extended by that document to controversies between aliens and citizens or States." *Sabbattino*, 376 U.S. at 462. In *Sabbattino*, this Court expressly rejected the claim made by Petitioners here that judicial review was precluded because foreign policy was implicated. *Id.*

Dr. Alvarez' claims were brought under two federal statutes to remedy harms inflicted by lower level executive officials. Judicial abstention, just because these claims may touch on foreign policy concerns, would raise unprecedented issues concerning separation of powers. Never before has this Court refused to enforce federal statutes that are unquestionably constitutional just because they pertain to foreign affairs. Petitioners' arguments for dismissal have no stopping point; they would require courts to dismiss every claim authorized by federal law, no matter how egregious the injuries, if it relates in any way to foreign policy.

Similarly, Petitioners' attempt to invoke the President's power over foreign policy is misplaced. Although the President unquestionably has a unique role in representing the nation in international relations, *United States v.*

Curtiss-Wright Export Corporation, 299 U.S. 304 (1936), this case does not involve policy choices by the President. Quite the contrary, it involves decisions by low-level DEA officials acting in a manner not authorized by federal law or the President. Under the Government's analysis, the Executive's power to 'take care that the laws be faithfully executed' trickles down to *any* federal law enforcement agent, no matter what position they hold. *Pet. Brf.* at 13.

Petitioners' arguments concerning separation of powers are wrong both as a matter of constitutional law and logic. Petitioners argue that the President on occasion, such as in the war on terrorism, might need to authorize the kidnapping of a foreign national. *Sosa Br.* at 38-39; *Br. Of U.S. Supporting Petitioner*, at 31-40. They then infer from this that the courts never should allow any suit challenging foreign kidnapping done by any executive official under any circumstances. However, remedying the unlawful and unauthorized acts of low-level DEA officials under either the ATCA or FTCA does not challenge the exercise of Presidential powers to violate international law to protect this Nation's security.

This Court has expressly distinguished between the President's immunity from civil suit for actions done while carrying out the presidency and the diminished immunity of other executive branch officials. *Compare Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (absolute presidential immunity), with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (denying absolute immunity and according qualified immunity to high level executive officials). In essence, Petitioners are urging this Court to create absolute immunity to civil suits for any executive branch official acting in any area implicating foreign policy concerns. Such expansive immunity has no support from any decision of this Court and

is logically unnecessary to protect the rare case involving a presidential action in foreign policy.

As a matter of separation of powers law, Petitioners' argument is flawed because it undermines the system of checks and balances which are at the core of our constitutional system. The "[s]eparation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty." *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring). As James Madison wrote in the Federalist Papers: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 301 (C. Rossiter ed. 1961).

Petitioners would undermine the separation of powers by allowing the executive branch unreviewable power to authorize any action any federal law enforcement official deems necessary in any foreign country. Preventing the judiciary from carrying out its basic and traditional function of according remedies to injured individuals violates basic principles of separation of powers. *United States v. Nixon*, 418 U.S. 683, 707 (1974) ("The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Article III.")

This Court will not in any way disrespect the Executive and will not undermine the separation of powers by affirming the Court of Appeals' judgment in this case that Dr. Alvarez-Machain is entitled to a modest damages remedy for the violation of his rights by DEA agents who transgressed the limitations on their activities set by Congress and international law.

CONCLUSION

For all of the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Dated: February 27, 2004

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(7)

No. 03-485

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Relying on the presumption that statutes do not have extraterritorial reach, the court of appeals held that respondent's arrest was not authorized by 21 U.S.C. 878, and was therefore tortious, because it *was* carried out in a foreign country. Applying the so-called "headquarters doctrine," the court then held that the tortious conduct was actionable under the Federal Tort Claims Act (FTCA) because it did *not* "aris[e] in a foreign country." 28 U.S.C. 2680(k). Both holdings cannot be correct.

Indeed, as the government demonstrated in its opening brief, both holdings are wrong. While the arrest did, in fact, occur abroad, the court of appeals' reliance on the presumption against extraterritoriality to find the authority to arrest absent was misplaced for a number of reasons, including that the relevant statute applies to all felonies, a number of which expressly cover extraterritorial conduct, and that the presumption does not apply to statutes that grant the Executive Branch authority to enforce the law, as *Maul* v. *United States*, 274 U.S. 501 (1927), makes clear. The court's application of the "headquarters doctrine" is equally misguided, and irreconcilable with the text of the FTCA, because,

among other things, every element of the alleged tort occurred in Mexico.

More broadly, the court below erred in limiting the Executive's authority to enforce the law extraterritorially at the same time it vastly expanded the role of Article III courts in applying the law abroad, despite the FTCA's foreign-country exception. The result cannot be squared with either the text of the relevant statutes or the Constitution's allocation of power over foreign relations.

I. THE DRUG ENFORCEMENT ADMINISTRATION'S ARREST OF RESPONDENT WAS AUTHORIZED

A. The Arrest Of Respondent Was Authorized By 21 U.S.C. 878

The Ninth Circuit held that the Drug Enforcement Administration (DEA) categorically lacks the authority under Section 878 to make an arrest abroad (Pet. App. 33a-50a), even when the foreign country consents (*id.* at 35a n.24). In its opening brief (at 17-40), the government demonstrated that that interpretation is erroneous, and respondent does not seek to defend the Ninth Circuit's categorical rule. Instead, he asks the Court to affirm on the ground that the statute does not authorize the DEA to make such arrests "without the consent of the host country." Resp. Br. 11. Accord *id.* at 9, 10, 27-28. That interpretation is equally erroneous. See U.S. Br. 38 n.7.

1. Section 878 does not require consent for an extraterritorial arrest

Respondent's interpretation of Section 878 has no basis in the text of the statute, and because it allows arrests abroad when the country consents, the interpretation cannot rely on the presumption against extraterritoriality. Instead, respondent relies (Br. 17-29) on the canon requiring statutes to be construed, when possible, so as not to violate international law (a principle of which, he says, is that non-consensual extraterritorial arrests are prohibited). See generally

Murray v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). That canon, however, cannot overcome the plain text of Section 878. In addition, the canon does not apply to a statute, like Section 878, that authorizes conduct by the branch of government most directly responsible for the conduct of foreign affairs and involves a core power of the Executive Branch. Respondent's interpretation is also mistaken because it would require courts to decide whether a country has consented to an arrest within its borders, a type of judgment for which they are ill-suited.

a. *Respondent's interpretation of Section 878 is not supported by the text of the statute*

Respondent's reliance on the *Charming Betsy* canon fails for the same basic reason the Ninth Circuit's reliance on the presumption against extraterritoriality fails. Section 878 authorizes, without any geographic, consent-based, or other limitation, arrests by the DEA for "any felony[] cognizable under the laws of the United States." 21 U.S.C. 878(a)(3)(B). As a textual matter, respondent's interpretation of Section 878 is even less plausible than the court of appeals'. Respondent reads into Section 878, not only a prohibition on extraterritorial arrests, but also a qualification to that prohibition. Thus, while the court of appeals reads Section 878 as if it authorized arrests for "any felony cognizable under the laws of the United States, except in a foreign country," respondent reads it as if it authorized arrests for "any felony cognizable under the laws of the United States, except in a foreign country, unless the foreign country consents."

To borrow a sentence from respondent's brief (at 8), "Section 878 simply does not say this." It strains credulity to presume that, in granting the express authority to make arrests for any felony, Congress meant to include both an implied limit on extraterritorial arrests and an implied qualification if formal consent is granted. In the first place, statutes are not ordinarily construed so that the implied

provisions outnumber the express ones. Moreover, Congress was presumably aware that many felony statutes prohibit extraterritorial conduct, including conduct that directly threatens United States foreign policy. See, *e.g.*, 18 U.S.C. 1116(c) (attacks on diplomats); 18 U.S.C. 1119 (murder of U.S. national abroad); 50 U.S.C. 424 (extraterritorial jurisdiction over crimes related to release of national security information). The United States has a clear interest in punishing such conduct whether or not it can gain the express, rather than tacit, consent of a foreign nation.

b. The canon requiring statutes to be construed so as not to conflict with international law does not apply to Section 878

Respondent's reliance on the *Charming Betsy* canon is also misplaced because it does not apply to a statute like 21 U.S.C. 878, which is a broad authorizing statute that "carr[ies] into Execution" core Executive powers. U.S. Const. Art. I, § 8, Cl. 18. Section 878 authorizes officers and employees of the DEA to carry firearms, execute warrants, make warrantless arrests for any felony, seize property, and "perform such other law enforcement duties as the Attorney General may designate." 21 U.S.C. 878(a). In establishing the DEA and conferring upon it this broad investigative and arrest authority, Congress was well aware of the DEA's international mission and the Executive's preeminent role in dealing with foreign nations. Especially in this context, a statute that addresses the President's constitutionally assigned law enforcement functions should be interpreted, in the absence of an explicit limitation, to confer authority on the agency that is commensurate with the power of the Executive.

The Executive has the preeminent role in ensuring that its foreign law enforcement conduct complies with international law. That is particularly true in the context of the kind of customary international law invoked by respondent.

The extent to which customary international law norms should constrain the conduct of Executive functions is uniquely a question for the Executive. Indeed, the Executive's own custom and conduct helps determine the extent to which there is a sufficiently clear norm of international law. As a consequence, it is not reasonable to presume that, in enacting a broadly worded enforcement statute granting authority to the Executive, Congress implicitly incorporated a limit based on a particular view of a customary international law norm governing Executive conduct. Such a presumption is even less warranted when, as in this case, the principle of customary international law in question is ill-defined, has never been addressed by Congress, and implicates not only the Executive's law enforcement powers but also its power to conduct foreign affairs.[1]

The primary rationale for the presumption that statutes incorporate principles of customary international law is that Congress generally wishes to avoid "[t]he possibility of international discord." *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963). That is a legitimate concern with statutes that regulate private primary conduct, where private-party lawsuits can inject courts into sensitive foreign policy matters, but not with statutes that grant broad enforcement powers to the Executive

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[1] Respondent suggests that it is not merely customary international law that prohibits non-consensual extraterritorial arrests but an explicit agreement between the United States and Mexico. Br. 27-28 (citing Agreement on Cooperation in Combatting Narcotics Trafficking and Drug Dependency, Feb. 23, 1989, U.S.-Mexico, T.I.A.S. No. 11,604, art. I(3) (Agreement)). But that agreement was not in force at the time of respondent's arrest. See Agreement art. V & n.1. In any event, all the agreement says is that it "does not empower" one party to enforce that party's laws in the territorial jurisdiction of the other party. *Id.* art. I(3). Not authorizing something is not the same as prohibiting it. Cf. *United States* v. *Alvarez-Machain*, 504 U.S. 655, 663-665 (1992) (concluding that failure of extradition treaty to authorize transborder arrests did not mean that the treaty prohibited them).

Branch. With a statute of the latter type, the Executive Branch—the Branch on which the Constitution confers authority to conduct foreign relations—can decide for itself whether a proposed action is likely to cause "international discord," and, if so, whether such foreign policy costs are outweighed by the law enforcement benefits. See *United States* v. *Corey*, 232 F.3d 1166, 1179 n.9 (9th Cir. 2000) (noting that, in *Charming Betsy*, Court interpreted statute at issue in private dispute "so as to avoid embroiling the nation in a foreign policy dispute unforeseen by either the President or Congress," and that "[t]hese concerns are obviously much less serious where the interpretation arguably violating international law is urged upon us by the Executive Branch"), cert. denied, 534 U.S. 887 (2001).[2]

None of the cases cited by respondent (Br. 25-28 & nn. 18-21) involves a statute broadly authorizing Executive conduct, like that at issue here. And respondent is mistaken in his contention that two of the decisions (Br. 27 n.19) applied the *Charming Betsy* canon to a statute involving "the Executive's investigatory powers." Br. 27. In one of those cases, *CFTC* v. *Nahas*, 738 F.2d 487 (D.C. Cir. 1984), the canon was applied to a statute granting courts jurisdiction to enforce certain subpoenas. In the other, *FTC* v. *Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980), it was applied to a statute granting subpoena power to an independent agency.[3]

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[2] Nor, as respondent contends (Br. 26), is application of the *Charming Betsy* doctrine necessary for reasons of separation of powers, so that courts do not cause unintentional violations of international law. In interpreting Section 878, courts do not mandate particular action but simply construe the general scope of the Executive's authority. It is the Executive that decides how to use its authority in particular circumstances.

[3] Respondent contends that, even if Section 878 authorizes non-consensual extraterritorial arrests, Congress "did not authorize low-level subcabinet officials to make the decision to engage in [such] acts [and thereby] violate international law." Br. 28. But there is no canon according to which statutes presumptively prohibit the violation of customary interna-

c. *Under respondent's interpretation of Section 878, courts would be required to make determinations that are beyond their competence*

Respondent's interpretation of Section 878 should also be rejected because it would place judges in the inappropriate position of making decisions about consent by foreign governments, an area where courts traditionally play no role. Such a counterintuitive congressional intent should not be inferred in the absence of clear textual direction.

As the government pointed out in its opening brief, the determination of whether a foreign country has consented to an arrest, either formally or informally, is a matter for "diplomatic resolution," not "judicial inquiry." Br. 38 n.7. That is particularly true because countries sometimes cooperate with the United States in making an extraterritorial arrest but, for reasons of domestic or international politics, cannot acknowledge that fact publicly. See *id.* at 38. Respondent suggests no standard by which, in a case of that type, a court could determine whether the requisite consent was given.

Nor does he provide answers to the questions posed by Judge O'Scannlain in his dissent. See Pet. App. 100a. What if, for example, there was doubt at the time of the arrest about whether there was a legitimate government from whom consent could be sought, or if there were "multiple contenders"? *Ibid.* How should a court go about determining whether a government is legitimate, or determining which contending government's consent counts? And what if no legitimate government is in place? Respondent suggests that consent must be given by "duly authorized officials," Br.

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tional law unless authorized by an Executive Branch official of a sufficiently high (though unspecified) rank. Moreover, as noted in the government's opening brief (at 40 n.9), Congress knows how to specify a requirement of personal authorization by designated high-ranking officials, and absent such a specification, courts are ill-equipped to decide which Executive Branch officials have a sufficiently high rank.

18 (quoting 1 Restatement (Third) of Foreign Relations Law of the United States § 432(2) (1987)), but he proposes no standard, much less a judicially manageable one, for determining whether consent has been obtained from the appropriate person. In the end, respondent has no answer to Judge O'Scannlain's observation that courts are "quite unsuited to undertake such analyses," and that doing so would bring them "perilously close to trenching on the power of diplomatic recognition that Article II, Section 3 places at the core of the Executive's foreign affairs authority." Pet. App. 100a-101a.[4]

2. The presumption against extraterritoriality does not apply to Section 878

In adopting a categorical rule that Section 878 does not authorize *any* transnational arrests (see Pet. App. 35a n.24), the court of appeals relied heavily on the presumption against the extraterritorial application of statutes (*id.* at 35a-50a). Although respondent seeks to draw support from this presumption (Br. 29-35), under his interpretation of the statute Section 878 does authorize transnational arrests (when the foreign country consents) and thus does apply extraterritorially in those circumstances. His reliance on the presumption is to that extent self-defeating.

But even if the presumption against extraterritoriality were consistent with respondent's position, it would not provide him any assistance, because the presumption does not apply to Section 878 and would be satisfied even if it were applicable. See U.S. Br. 27-40. In the first place, the statute

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[4] Moreover, even the court below concluded that there was no general international law prohibition on transborder arrests. See Pet. App. 21a-27a. In addition, regardless of whether a foreign country gave its consent, an extraterritorial arrest would not violate international law if, for example, the arrest was authorized by the United Nations Security Council, was undertaken in self-defense, or occurred in disputed territory. Federal courts are equally unsuited for deciding whether an arrest in a foreign country was justified on one of those grounds. See U.S. Br. 38 n.7.

by its plain terms grants arrest authority for "any felony." In light of the numerous criminal statutes that apply abroad, and the possibility that criminals will flee abroad, the plain terms of the statute authorize arrests abroad. Moreover, the specific limitations on extraterritorial arrests imposed by the Mansfield Amendment reinforce the conclusion that Section 878 involves a broad grant of arrest authority for any felony, including a felony committed abroad. See p. 15, *infra*. Respondent's arguments to the contrary are without merit.

a. *The presumption is not applicable to statutes that grant the Executive Branch authority to enforce the law*

As the government noted in its opening brief (at 29), this Court held in *United States* v. *Bowman*, 260 U.S. 94 (1922), that the presumption against extraterritoriality does not apply to statutes criminalizing conduct that, by its nature, can occur outside the United States. And the government showed (Br. 29-31) that the court of appeals' reliance on the presumption to limit the Executive's enforcement authority was inconsistent with this Court's decision in *Maul* v. *United States*, 274 U.S. 501 (1927), which applied *Bowman* in construing an ambiguous statute to permit the extraterritorial seizure of a ship in order to enforce the revenue laws. Respondent's efforts to distinguish *Maul* (Br. 31-32) are unavailing.

First, respondent says that *Maul* "never mentions the presumption against extraterritoriality." Br. 31. But that is precisely the point. Maul relies on *Bowman*, which found the presumption inapplicable.

Second, respondent points out that *Maul* "involved U.S. citizens and a U.S. boat." Br. 31. That is true but irrelevant. This Court's holding there did not depend on the fact that the case involved suspects who were citizens of the United States, and the Ninth Circuit's holding here did not depend on the fact that the case involves a citizen as the victim and a

suspect who is a citizen of a foreign country. The issue is whether 21 U.S.C. 878 authorizes the DEA to make arrests abroad, and neither the court of appeals' nor respondent's interpretation of that statute depends on the citizenship of the arrestee.

Third, respondent argues that, because the statute at issue in *Maul* allowed the Coast Guard to seize vessels "as well without as within their respective districts," it "explicitly authorized extraterritorial seizures." Br. 31 (quoting Act of Mar. 2, 1799, ch. 22, § 70, 1 Stat. 678). That contention simply denies the entire premise of the *Maul* decision. The Court found the statutory language ambiguous with respect to the question of extraterritoriality (because the language could be read to authorize seizures only domestically, but to allow seizures both within a seizing vessel's particular district and in other domestic districts), and it resolved the ambiguity by applying *Bowman*. 274 U.S. at 510-511.

Fourth, respondent contends that *Maul* is distinguishable because it "involved the *military* (*i.e.*, the Coast Guard), and thus implicated the Commander-in-Chief power in a manner not implicated in this case." Br. 32. But that was not part of the rationale for the Court's holding. Nor could it have been, since *Maul* did not in any meaningful sense involve the military. Under the Act that created it, the Coast Guard operated "under the Treasury Department in time of peace" and "as a part of the Navy * * * in time of war." Act of Jan. 28, 1915, ch. 20, § 1, 38 Stat. 800-801. In *Maul*, the Coast Guard was acting in the former capacity—it was enforcing the revenue laws—and thus was not differently situated from the DEA here.

b. *Applying the presumption would undermine its purposes*

Just as applying the *Charming Betsy* canon to limit Executive action makes little sense, applying the presumption against extraterritoriality to a statute like Section 878 does not advance the purposes underlying the presumption. Applying the presumption to a statute that regulates private primary conduct ensures that courts do not become involved in sensitive international matters for which the political branches have primary responsibility. As the government noted in its opening brief (at 35-40), these same considerations weigh *against* application of the presumption to a statute, like 21 U.S.C. 878, that grants the Executive Branch the authority to enforce the law, because the Executive has the constitutional responsibility for the conduct of foreign affairs and can make a judgment about whether extraterritorial application of the statute in a particular case will further the Nation's foreign policy interests.

Respondent has little to say in response to this point, except for a conclusory assertion that the court of appeals' reliance on the presumption does not "limit executive power over foreign affairs." Br. 34. But that is manifestly untrue. Arresting a suspect in a foreign country and dealing with the consequences of that action are both exercises of the Executive's power over foreign affairs. In a case in which a criminal "is hiding in a country * * * where the government, such as it is, is powerless to aid in his removal, or * * * where the Government is unwilling," 131 Cong. Rec. 18,870 (1985) (statement of Sen. Specter), respondent and the court below would leave the Executive Branch with only two options: allow the criminal to go unprosecuted or use the military to capture him. Since a central purpose of the presumption against extraterritoriality is to prevent interference with the Executive's conduct of foreign affairs, an application of the presumption

that would tie the Executive's hands in this way would undermine the purposes underlying the presumption.[5]

B. The Arrest Of Respondent Was Not Prohibited By The Mansfield Amendment, Which In Fact Confirms That It Was Authorized By Section 878

In its opening brief (at 23-27), the government demonstrated that the Mansfield Amendment, 22 U.S.C. 2291, which prohibits arrests in foreign countries under specified circumstances, would have been unnecessary if, as the Ninth Circuit held, 21 U.S.C. 878 prohibited such arrests under all circumstances. Respondent does not merely deny that the Mansfield Amendment shows that Section 878 authorized his arrest; he takes the position for the first time that the Amendment itself prohibited his arrest. Br. 11-17. Respondent is mistaken on both counts.

1. The Mansfield Amendment did not prohibit respondent's arrest

At the time of respondent's arrest, Section 2291(c)(1) provided, as it does today, that "[n]o officer or employee of the United States may directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts." 22 U.S.C. 2291(c)(1) (Supp. I 1989). In its opening brief (at 23-24 & n.3), the government identified three separate reasons why this provision did not prohibit the arrest of respondent: the arrest was not

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[5] Respondent relies (Br. 30) on *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), where this Court applied the presumption against extraterritoriality in holding that a statute prohibiting the return of an alien to his country may not be invoked by an alien intercepted at sea. But *Sale* is not like this case, because the statute at issue there *restricted* the power of the Executive, and the application of the presumption thus furthered, rather than hindered, its ability to conduct international relations. See *id.* at 188 ("Th[e] presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility.").

"directly effect[ed]" by officials of the United States; it was not part of a "foreign police action"; and it was not effected in connection with "narcotics control efforts." Respondent's contention that Section 2291(c) nonetheless prohibited his arrest (Br. 11-16) is without merit.

Respondent first argues that the DEA "directly effect[ed]" his arrest because it "initiated and supervised the entire operation." Br. 13. But a "direct[]" arrest is one in which there is no "intervening agency, instrumentality, or influence." *Webster's Third New International Dictionary* 640 (1986). Because respondent's arrest was carried out by just such an intervening means—Mexican nationals who were not DEA agents—the arrest was effected indirectly rather than directly.

Relying on a statement in a Senate Report, respondent next argues that a "foreign police action" includes a police action in a foreign country by United States officials. Br. 11-12 (quoting S. Rep. No. 605, 94th Cong., 2d Sess. 55 (1976)). Accord *id.* at 13. But that piece of legislative history does not relate to the meaning of the term "foreign police action." The Senate Report was for a bill that would have prohibited United States officials from "engaging in *any police action* in any foreign country with respect to narcotics control efforts," S. Rep. No. 605, *supra*, at 54 (emphasis added), and the portion of the report on which respondent relies addressed the meaning of the term "police action," *id.* at 55. While the phrase "any police action" certainly could be read to include an American police action abroad, that broad prohibition did not become law. See 22 U.S.C. 2291(c)(1) (1976). Rather, the version of Section 2291(c)(1) in effect at the time of respondent's arrest, which has not changed since, prohibited only arrests that were, *inter alia*, part of a "foreign police action," 22 U.S.C. 2291(c)(1) (Supp. I 1989). None of the legislative history cited by respondent (Br. 11-12 &

n.7) addresses the meaning of that phrase.[6] And the text and context of the term demonstrate that a "foreign police action" means a police action by the police of a foreign country. See U.S. Br. 24 n.3.[7]

Finally, while respondent contends that his arrest was "directly effect[ed]" by the DEA and was part of a "foreign police action," he never contends that it was effected in connection with "narcotics control efforts." Nor could he, since the arrest was not on narcotics charges, but on charges of racketeering, kidnapping, and murder. See *United States* v. *Alvarez-Machain*, 504 U.S. at 657 n.1. Whatever the scope of Section 2291(c)(1)'s prohibition of extraterritorial arrests, it does not encompass the arrest of someone charged with the murder of a United States government official.

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[6] Nor does the Office of Legal Counsel opinion on which respondent relies (Br. 12) support his contention that his arrest was part of a "foreign police action." That opinion addressed the question whether the Mansfield Amendment applies to "the use of United States military officers and equipment to assist foreign governments in *their* drug enforcement activities." *Application of the Mansfield Amendment to the Use of United States Military Personnel and Equipment to Assist Foreign Governments in Drug Enforcement Activities*, 10 Op. Off. Legal Counsel 122, 122 (1986) (emphasis added). In any event, the version of Section 2291(c) then in effect did not include the phrase "foreign police action." See *ibid.*

[7] Respondent's alternative argument that his arrest satisfies even this definition, because "the enterprise was a joint effort between the DEA and the Mexican nationals it hired to * * * [arrest] a person indicted for a criminal offense," Br. 13, overlooks the fact that the arrest was not carried out by Mexican police. That is not a technicality. Indeed, the premise of respondent's theory that the arrest was false and therefore tortious and actionable under the FTCA (and arbitrary and therefore an actionable violation of the law of nations under 28 U.S.C. 1350) is that the arrest was not made by the Mexican police, who indisputably have arrest authority in Mexico.

2. The Mansfield Amendment confirms that respondent's arrest was authorized by Section 878

Far from precluding the arrest here, the Mansfield Amendment confirms that the arrest was authorized by Section 878. Respondent denies that interpreting Section 878 not to authorize extraterritorial arrests would render the Mansfield Amendment's limitations meaningless, because the Amendment covers agencies besides the DEA. Br. 16. But the argument that an Amendment designed to preclude certain arrests "with respect to narcotics control" was not directed to the agency specifically charged with narcotics control is not sustainable.

First, the legislative history of the Mansfield Amendment confirms that the DEA was the agency that Congress principally had in mind when it passed the Amendment.[8] Second, if Section 878 does not provide the DEA with authority to make extraterritorial arrests, it is not clear how any federal agent had the authority to make extraterritorial arrests subject to the limits and exceptions of the Mansfield Amendment. The statutory provision that authorizes arrests by the Federal Bureau of Investigation (18 U.S.C. 3052), like the provision that authorizes DEA arrests (21 U.S.C. 878), does not explicitly authorize arrests in foreign countries. Respondent's argument about Section 878 thus leaves the Mansfield Amendment as a limitation in search of an extraterritorial arrest authority to limit. This Court can avoid that anomaly by reading Section 878, consistent with its plain terms, to authorize arrests for any felony, including one committed abroad.

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[8] See, *e.g.*, S. Rep. No. 605, *supra*, at 55 (Committee's intent is that DEA insure that agents abroad not take actions that might embroil United States in internal affairs of other countries); 122 Cong. Rec. 2591 (1976) (statement of Sen. Percy) (explaining what DEA may and may not do under Amendment); *id.* at 2593 (statement of Sen. Mansfield) (Amendment would provide DEA with guidelines for conduct abroad).

C. The Arrest Of Respondent Was Also Authorized Because It Was A Permissible Citizen's Arrest

In its opening brief (at 41-42), the government demonstrated that, even if the arrest of respondent was not authorized by 21 U.S.C. 878, it would not be tortious under the California law that governs citizen's arrests. Because the government is only liable under the FTCA "to the same extent as a private individual under like circumstances" (28 U.S.C. 2674), and because respondent's arrest would have been permissible under California law if it had been carried out by a private individual, the government is not liable under the FTCA. See U.S. Br. 41-42. Respondent does not deny that the arrest would have been authorized if it had been carried out by a private person. Instead, he treats that fact as irrelevant, because "a federal law enforcement agent does not act 'under like circumstances' to a private citizen." Resp. Br. 39. But no such categorical rule exists. To the contrary, when a federal officer acts outside the territorial scope of his special authority, he is just like an ordinary citizen, and is not subject to liability under circumstances that would constitute a valid citizen's arrest, as the very authority on which respondent relies (*ibid.*) shows.

Respondent, like the court below, relies on *Arnsberg* v. *United States*, 757 F.2d 971 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986). *Arnsberg*, for its part, followed the Second Circuit's decision in *Caban* v. *United States*, 728 F.2d 68 (1984). See *Arnsberg*, 757 F.2d at 978-979. Neither case helps respondent.

Both *Caban* and *Arnsberg* recognize that, in situations where a citizen is *not* authorized to arrest or detain an individual, courts cannot automatically impose liability on federal officers under the "like circumstances" test without considering the special authority granted to the federal officers. If the rule were otherwise, then every federal prison warden would face liability because he wields authority to

detain prisoners unlike any authority enjoyed by private citizens. For that reason, *Caban* refused to hold INS agents liable for a border detention even assuming private citizens had no comparable power to detain, 728 F.2d at 74-75, and *Arnsberg* refused to hold federal agents liable for arresting an individual on a material witness warrant even though private citizens had no authority to arrest in the absence of a crime, 757 F.3d at 978-979. But those decisions refusing to hold federal officers liable in circumstances where citizens lack authority to arrest provide no basis for holding federal officers liable in circumstances where a citizen *would* have the requisite authority.

Indeed, the Ninth Circuit's and respondent's reading of *Caban* and *Arnsberg* turns those precedents on their heads. When a law enforcement officer acts beyond the territorial limits of his special authority, he is in "like circumstances" to a private citizen, who likewise enjoys no special authority to arrest. California law recognizes this well-established principle, see U.S. Br. 41 & n.10, and there is no question that it would authorize a citizen to arrest respondent. In the same way that federal law authorizes a DEA agent to make a warrantless arrest if he has probable cause to believe that a felony has been committed, see 21 U.S.C. 878(a)(3)(B), California law authorizes a "private person" to "arrest another" when "a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it," Cal. Penal Code § 837(3). The very existence of this statute, whose language is virtually identical to Section 878, refutes respondent's contention that there is "no analogy" (Br. 40) between an arrest by a DEA agent and an arrest by a private individual. In circumstances like these, when any citizen could validly arrest respondent, federal officers are not uniquely without authority to arrest.

Finally, respondent's contention that federal law enforcement officers inherently are in "unlike circumstances" from a private citizen is not only deeply flawed but self-destructive.

As the Second Circuit correctly recognized in *Caban*, the consequence of there being no analogy between government and private authority is not a rule of automatic government liability, but the absence of a waiver of sovereign immunity. See 728 F.2d at 74.[9]

II. THE FEDERAL TORT CLAIMS ACT EXCEPTION FOR CLAIMS ARISING IN A FOREIGN COUNTRY BARS RESPONDENT'S LAWSUIT

The court of appeals held that respondent's false-arrest claim arose in California, and thus falls outside the FTCA's exception for claims arising in a foreign country, even though every element of the allegedly tortious conduct occurred in Mexico, damages accrued only while the conduct continued in Mexico, and the only reason the conduct was found to be tortious was that it occurred in Mexico. In its opening brief (at 43-50), the government demonstrated the erroneousness of that holding. Respondent urges the Court to affirm on the ground that "an FTCA suit does not arise in a foreign country and is thus not barred where it alleges that conduct *within the United States* caused harmful extraterritorial effect." Br. 36. That principle, however, has no basis in the text of the FTCA, which excludes from its coverage "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k). The FTCA requires the tortious conduct to take place in the United States, and the fact that conduct in this country

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[9] Respondent contends that "[p]ermitting law enforcement to use 'citizen's arrests' to escape restrictions on their authority may also violate the Fourth Amendment." Br. 40. But treating the arrest of respondent as a citizen's arrest would not enable the DEA to escape any restrictions imposed by the Fourth Amendment. The DEA agents would remain government actors subject to the Fourth Amendment when and where it applies. In any event, the California law that authorizes an arrest of the kind that occurred here requires that the "private person" effecting the arrest have "reasonable cause" to believe that the arrestee committed a felony, Cal. Penal Code § 837(3), and the indictment returned by the grand jury established that there was probable cause to believe that respondent had done so.

"caused" harmful extraterritorial effects does not mean that the domestic conduct is itself tortious. Indeed, respondent's view of where conduct arises would undermine the premise of the Court's decision in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that the Fourth Amendment does not apply abroad), because the searches there were arranged by DEA agents in California. See *id.* at 262.

Respondent relies on the fact that "the decision of United States governmental officials * * * to arrest" him was made in the United States, and that the DEA "planned and ordered the execution of th[e] operation" here. Br. 38. He contends that these actions were "torts committed in [California] that have extraterritorial effect." Br. 36. But the cause of action in question is not conspiracy, which in any event "is not a tort in the State of California." *Petherbridge* v. *Altadena Fed. Sav. & Loan Ass'n*, 112 Cal. Rptr. 144, 150 n.3 (Ct. App. 1974). The cause of action is false arrest, and every element of that tort occurred in Mexico. It is therefore a "claim arising in a foreign country" that is excluded from the FTCA's waiver of sovereign immunity. 28 U.S.C. 2680(k).

Contrary to respondent's assertion (Br. 36), this result is entirely consistent with *Richards* v. *United States*, 369 U.S. 1 (1962), which holds that, under 28 U.S.C. 1346(b)(1), "the act or omission occurred" where the negligence took place, even if the injury occurred elsewhere. That holding is a straightforward application of the principle that the "act" in a negligence case is the negligence itself—the breach of a duty of care. See W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 31, at 169 (5th ed. 1984). For that reason, the cause of action for the negligent repair of an airplane in Oklahoma likely would arise in Oklahoma even if the plane crashed in Mexico. In an intentional-tort case, however, the "act" is the prohibited intentional act—in this case, the false arrest—and ordinarily occurs in the same place that the injury occurs. There is thus nothing "anoma-

lous" (Resp. Br. 38) about the fact that the government is liable when its agent commits an act of negligence in the United States that causes harm in a foreign country, but not when its agent commits an intentional tort in a foreign country that was planned in the United States. Only the latter situation involves a tort that "aris[es] in a foreign country." 28 U.S.C. 2680(k).

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For the foregoing reasons, as well as those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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